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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION

Petition for Revocation of MCI's FCC Authority Revisited

ORDER

Adopted: November 8, 1988; Released: November 21, 1988

By the Commission:

1. On June 14, 1988, TeleSTAR, Inc. (TeleSTAR) filed a pleading entitled "Comments for Consideration" (Comments), criticizing the Commission's *Order* in this proceeding, released June 2, 1988. *MCI Telecommunications Corporation*, FCC 88-183, *appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1419 (D.C. Cir.). Because TeleSTAR's pleading criticizing the *Order* was received within the time for filing petitions for reconsideration, it will be treated as a petition for reconsideration pursuant to 47 C.F.R. § 1.106. *See* General Counsel Letter, August 15, 1988. MCI filed an Opposition to TeleSTAR's Comments. TeleSTAR did not reply.[1]

2. TeleSTAR's main argument is apparently that MCI lacked authority to construct its Ventura/Santa Barbara, California microwave route because "there was no FCC public record of any kind" relating to MCI's Special Temporary Authority (STA) for this route. Comments at 8 (emphasis omitted); *see generally*, *id.* at 3-8. As was previously explained, *Order* at n.4, TeleSTAR's argument is factually incorrect. Copies of MCI's STA and an extension thereof[2] were kept in publicly available STA notebooks in the Domestic Radio Branch offices. [3] TeleSTAR first requested a copy of these STAs on April 18, 1988; certified copies were provided the next day. *See id.*

3. TeleSTAR also claims that a Downtown Copy Center employee previously "requested several times that [she] be provided with copies of all recent STA's relative to the dates of [her] investigations for TeleSTAR . . . ." Comments at 3 (citing TeleSTAR Errata to Petition). TeleSTAR claims that the fact that this search did not produce the MCI STA in question "cast[s] serious doubt on the Commission's story. . . ." *Id.* at 4. In the cited statement, however, the Downtown Copy Center employee certified only that she had "been doing document research for Tele-STAR, Inc. regarding the Special Temporary Authority Log," a document which, apparently unbeknownst to her, had been discontinued prior to the grant of MCI's STA. *See Order* at n.4.[4] The Commission's own records show that she did not request STAs. Accordingly, it is apparent that the Downtown Copy Center employee's failure to locate the MCI STA resulted from an error in her search procedure.

4. TeleSTAR also raises, for the first time in this proceeding, two new factual allegations -- (1) that, on its Form 435 applications for its Ventura/Santa Barabra route, MCI incorrectly answered "no" to Item 12's question of whether a new station was proposed, and (2) that MCI illegally constructed a microwave network in "Rapid City, Iowa." With respect to its answers to Item 12, MCI has persuasively explained that it simply made an inadvertent mistake and that it was self-evident from other portions of its applications that new construction was involved. Opposition to Comments for Consideration at 11-16. Accordingly, no enforcement action is warranted. With respect to the lack of authorization for MCI's "Rapid City, Iowa" route, we note that no such city exists and that TeleSTAR was apparently referring to MCI's Cedar Rapids, Iowa route. An STA for this route was issued December 14, 1988; accordingly, TeleSTAR's allegation that no authorization was received is incorrect.

5. Finally, TeleSTAR repeats, without any new facts, allegations previously rejected by the Commission. *Compare, e.g.*, Comments at 2 *with Order* at ¶ 4 (relating to local building permits). These repetitious allegations do not serve as a basis for altering our prior decision and will not be considered further. *See, e.g., Regulatory Policy Regarding the Direct Broadcast Satellite Service*, 53 RR 2d 1637, 1641-42 (1983), *vacated on other grounds sub nom. National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984).

6. Accordingly, IT IS ORDERED that the "Comments for Consideration" filed by TeleSTAR, Inc. on June 14, 1988, treated herein as a petition for reconsideration, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By a pleading in D.C. Circuit Court of Appeals Case No. 88-1419, served on September 1, 1988, TeleSTAR stated to the D.C. Circuit that its Comments were "never intended for reconsideration . . . ." Opposition to Motion for Leave to File and Opposition to Motion to Hold in Abeyance at 1. It has not dismissed its Comments criticizing the *Order*, however, and, under the Commission's rules, its Comments could hardly be treated as anything other than a petition for reconsideration. *See* 47 C.F.R. § 1.106. Accordingly, we will address the matters raised therein pursuant to 47 C.F.R. § 1.106.

[2] TeleSTAR contends that the certified copy of the STA provided by the Commission, which is date stamped as being sent to Western Union for delivery to MCI, is "an internal FCC memo without any evident proof that it ever became what it was purported to be, an authorization for sending an STA-telegram to MCI." Comments at 5. In fact, the document's format is the one customarily used by the Commission for sending telegraphic STAs, as is apparent from a review of the STA notebooks.

[3] Contrary to TeleSTAR's suggestion that the STA notebooks are a recent development, Comments at 4 n.4, they have been used and available to the public for several years.

[4] Also, contrary to TeleSTAR's claim, Comments at 4, the Downtown Copy Center employee did not, in her statement attached to the Errata, say that she had been "informed" that the STA logs she was sent "contained all STAs to the date mentioned in her certificafion of April 5, 1988." Not only is there no reference to a date in the employee's statment, the employee's comment about the coverage of the STA log was limited to the statement that "file number 87-STA-393 is the last file number entered on the log . . . ." *See* Errata. As explained previously, *Order* at n.4, the STA log was discontinued in early December, 1987. While one entry was incorrectly made after the log was discontinued, this is not evidence that the Commission continued the log for all parties except MCI. *See* Comments at 6. In fact, between December 4 (the day after last entry before the log was discontinued) and December 22 (when the erroneous entry was made), five STAs were issued to parties other than MCI. Copies of these STAs, as well as MCI's, were and are available to the public in the STA notebooks.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VALLEY BROADCASTERS, INC. KAPS, Mount Vernon, Washington — **BC DOCKET NO. 82-436** File No. BP-801112AB

NORTHWEST INDIAN WOMEN BROADCASTERS, INC. Portland, Oregon — **BC DOCKET NO. 82-437** FILE NO. BP-801113AD

For Construction Permit

ORDER

Adopted: November 8, 1988; Released: November 21, 1988

By the Commission:

1. Before the Commission are: (a) an Application for Review of the Review Board's Decision filed by Northwest Indian Women Broadcasters, Inc. (Indian Women), on September 26, 1986; (b) an Opposition to Application for Review filed October 14, 1986 by Valley Broadcasters, Inc.; (c) an Erratum to Opposition filed October 27, 1986 by Valley; (d) a Request for Official Notice of New Fact filed March 11, 1987 by Indian Women; (e) Comments of Valley Broadcasters, Inc. on Indian Women's Request for Official Notice of New Fact filed March 27, 1987 by Valley; (f) a Motion to Strike filed April 1, 1987 by Indian Women; (g) Mass Media Bureau's Response to Commission Directive (Bureau Comments) filed July 23, 1987; (h) Comments by Valley and Indian Women filed July 29, 1987; (i) Responses by Valley and Indian Women filed August 12 and 13, 1987, respectively; (j) a Second Request for Official Notice of New Fact filed February 22, 1988 by Indian Women; (k) a Motion to Strike Second Request for Official Notice of New Fact filed March 8, 1988 by Valley; (l) an Opposition filed March 16, 1988 by Indian Women; and (m) a Reply to Opposition to Motion to Strike filed March 28, 1988 by Valley.

I. BACKGROUND

2. These pleadings relate to a decision of the Review Board granting Valley's application for a new standard broadcast station in Mount Vernon, Washington and denying Indian Women's application for Portland, Oregon. *Valley Broadcasters, Inc.*, 104 FCC 2d 1549 (Rev. Bd. 1986). Valley presently operates KAPS, a daytime-only AM station with a directional antenna. It proposes to modify its facilities to broadcast full-time, on a new frequency, with increased power. Valley proposes to use a perimeter current antenna (PARAN) which apparently has been used successfully in other countries but had not previously been proposed for use by a commercial broadcast applicant in the United States. *Id.* at 1555 ¶ 9. The PARAN system consists of four towers arranged in a square. It is useful in situations, like that faced by Valley, where there is limited ground area. It radiates a non-directional AM signal comparable to that of a much taller monopole tower. *Id.*

3. The Commission designated an issue to explore the PARAN system's performance capabilities as they relate to the Commission's technical requirements on the ground that the effectiveness of this type of antenna had not been established in the United States. 47 Fed. Reg. 34621, 34622 ¶ 10 (Aug. 10, 1982). Based upon an engineering report filed in connection with a clarifying amendment that the Commission had directed Valley to submit, Valley filed a motion for summary decision arguing that the report established that the PARAN system would meet the Commission's technical standards. *Valley Broadcasters, Inc.*, at 1557 ¶ 9. The Mass Media Bureau supported Valley's motion representing that the "Bureau's computer analysis of the Paran antenna array parameters confirm[ed] the radiation values proposed by Valley's consultant." *Id.* However, because the system was so new, the Bureau requested that conditions be placed on Valley's construction permit in the event its application was granted. *Id.* Administrative Law Judge Byron E. Harrison granted the summary decision and imposed the conditions requested by the Bureau. *Memorandum Opinion and Order*, FCC 83M-935 (Mar. 21, 1983).

4. By *Order*, FCC 87I-064 (June 29, 1987), the Office of General Counsel (OGC) requested all parties, including the Mass Media Bureau, to file comments on whether there remains a substantial and material question of fact as to whether Valley will be able to operate its proposed PARAN antenna system in conformity with the Commission's technical standards. OGC specifically requested comments on whether there was adequate evidence to support a summary decision in this case.

II. PARAN ANTENNA ISSUE

5. In its comments the Bureau reasserted its position that the capability of the PARAN antenna system to conform to the Commission's efficiency standards was "established" by Valley's clarifying amendment and that the radiation values proposed by Valley's consultant were confirmed by the Bureau's computer analysis. Bureau Comments at 2 ¶ 3. However, the Bureau did not submit the computer analysis or any underlying documentation that led it to the conclusion that Valley's theoretical projections were likely to occur as proposed. Rather, the Bureau urged that the complete proof of performance required by the conditions imposed by the ALJ entails the same measurements as a field study under 47 C.F.R. § 73.189(b)(5) for an antenna of less than minimum height; therefore, Valley's satisfaction of those conditions will assure its compliance with the Commission's requirements. *Id.* at 6 ¶ 9.

6. Valley argued in its comments that it previously provided full information about its PARAN antenna proposal sufficient to establish that the system will reliably operate in compliance with the Commission's technical standards, and that the Bureau has confirmed Valley's technical showing. Valley Comments at 2 ¶ 2. Valley referred to no new studies or information relating to the experience of existing or new PARAN systems.

7. Indian Women argued that the ALJ erred in granting Valley's motion for summary decision on the PARAN antenna issue and that the Board erred in affirming it because: (1) the decisions ignored the Commission's stated reason for designating the issue due to its lack of experience with the new system; (2) the ALJ and the Review Board accepted the Bureau's computer verification without knowing "what it consisted of"; and (3) Valley has not demonstrated that it has complied with section 73.189(b)(5). Indian Women Comments at 9 ¶ 13.

8. Indian Women also claimed that substantially all of the information describing the nature and performance characteristics of the antenna system was already on file with the Commission when the designation order was issued. Indian Women's Comments at 15 ¶ 23. The clarifying amendment did little more than establish the proposed height of the antennas. The mathematical formula for calculating the PARAN antenna system's efficiency still depended on the information supplied by the manufacturer and included in Valley's original application. *Id.* at 16 ¶ 24. Moreover, Indian Women asserted, the Bureau submitted no information in its comments with respect to additional documents, data, or experience subsequently obtained that might have enhanced its expertise in predicting the performance of the PARAN antenna. Indian Women's Reply Comments to Bureau Comments at 2 ¶ 2. Finally, Indian Women disputed the ability of the PARAN antenna to perform as proposed; Indian Women claimed that its own engineering analysis of Valley's proposal indicates that the proposed antenna will fail to produce the minimum efficiency required by the Commission. Indian Women's Reply Comments to Valley Comments, Attachment A.

9. After receipt of the these comments, we remain concerned that the present record in this case may not meet the legal standard for a summary decision of demonstrating "no genuine issue as to any material fact." 47 C.F.R. § 1.251(d); *GAF Broadcasting Co.*, 96 FCC 2d 411, 416 (Rev. Bd. 1984); *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975).

10. For there to be a rational connection between the Commission's factual findings and its conclusions, one must be able to discern that connection in the record and the agency decision. *MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296, 1300 (D.C. Cir. 1988). Therefore, although we agree that the requirements of section 73.189(b)(5) can be met generally by a conditioned grant, we are concerned that it may not be appropriate in a comparative hearing with respect to an untested antenna system where the precise extent of the applicants' proposed contours is at issue and where the record contains no definitive showing that the system will operate substantially as proposed. Finally, despite the fact that the antenna is used in Europe, and to some extent at United States military installations, no evidence was introduced demonstrating that the PARAN antenna had previously satisfied FCC efficiency standards. *See* 104 FCC 2d at 1558 ¶ 11.

11. Nonetheless, the Commission wishes to foster the development and use of new technology in a manner that will promote most efficient use of the spectrum for the public. *See* 47 U.S.C. § 157. We certainly do not wish to discourage applicants in comparative hearings from using new and innovative techniques in their proposals by requiring greater proof than would be otherwise imposed on an unopposed applicant. Fortunately, however, this case does not yet place the Commission in the position of having to balance enhanced service efficiency from new technologies against the Commission's responsibility to ensure that the due process rights of all applicants in a comparative hearing are fully protected.

12. The Commission on November 24, 1986 authorized Big Island Broadcasting Co., Inc. (BP-860604AE) to use a PARAN antenna in the experimental synchronous operation of radio station KIPA in Hilo, Hawaii. Program test authority for this facility was granted on April 5, 1988. Thus, there is at least one PARAN system presently operating. In light of the fact that none of the parties have commented on the relevance to this proceeding of the KIPA operation, we will order all parties now to do so.

13. Specifically, we direct the parties, including the Mass Media Bureau, to specify how the Commission's action concerning KIPA affects the PARAN antenna issue before us in this proceeding. Does the KIPA experience provide sufficient information to demonstrate that Valley's PARAN antenna will operate in compliance with the Commission's requirements? What information does it provide that would confirm or refute Valley's coverage proposal?

14. Additionally, to the extent that the Bureau continues to rely on its computer analysis of Valley's proposal, we direct the Bureau to submit that or a similar computer analysis and other underlying documentation in its possession, including any pertinent information in the relevant technical literature, that supports its conclusion that Valley's theoretical projections are likely to materialize as proposed.

15. ACCORDINGLY, IT IS ORDERED, that the parties ARE DIRECTED to file comments as herein described within thirty (30) days of the release date of this Order. Reply pleadings may be filed within fifteen (15) days of the date comments are filed.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT	File Nos. 10377-CF-AL(411)-88
COMMUNICATIONS	59-CE-AL(3)-88
COMPANY	2475-DSE-AL-88-(21)
(A General Partnership)	(E6802-X)
Assignor/Transferor	CSG-88-075-(AL)
	I-T-C-88-166 (AL)
	I-T-C-88-167 (TC)
	I-T-C-88-168 (TC)

and

US SPRINT
COMMUNICATIONS
COMPANY
LIMITED PARTNERSHIP
Assignee/Transferee

Application for Consent to
Assignment of Licenses and
Transfer of Control of
Corporation Holding Licenses

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1988; Released: November 21, 1988

By the Chief, Common Carrier Bureau:

1. US Sprint Communications Company (US Sprint) filed the above-captioned application for authority to assign to US Sprint Communications Company Limited Partnership (US Sprint L.P.) all of its authorizations and pending applications, including licenses and permits in the common carrier point-to-point microwave, digital electronic message, and domestic and international satellite services, as well as international Section 214 authorizations.[1] Also included, are requests for approval of transfers of control of Telenet Communications Corporation (Telenet), a wholly owned subsidiary of US Sprint, and Consortium Communications International, Inc. (CCI), a company controlled by Telenet. Both subsidiaries hold international Section 214 authority.

2. US Sprint is an equally owned joint venture of GTE Communications Services, Inc., a subsidiary of GTE Corporation (GTE) and US Telecom, Inc., a subsidiary of United Telecommunications, Inc. (United). US Sprint's licensed facilities provide voice, data, and video teleconferencing services throughout the United States, the U.S. Virgin Islands, Guam, Puerto Rico, and to numerous international points.

3. US Sprint L.P. will also be owned indirectly by GTE and United. This partnership, however, will not be a co-equal joint venture between the two. Instead, United will hold an 80.1 percent interest, in the form of a 50 percent general partnership interest, through US Telecom, Inc. and a 30.1 percent limited partnership interest, through UCOM, Inc., another of its subsidiaries. GTE, through GTE Communications Services, Inc., will hold a 19.9 percent limited partnership interest.

4. The proposed assignments and transfers of control will result in the transfer of less than 50 percent interest in the subject authorizations and the qualifications of the entities that comprise the assignee/transferee have been previously approved. They are, therefore, *pro forma* rather than substantial in nature. *See, e.g. Metromedia, Inc.* 98 FCC 2d 300 (1984), *Grace Missionary Baptist* Church, 80 FCC 2d 330 (1980); *Barnes Enterprises, Inc.*, 55 FCC 2d 721 (1975); *Clay Broadcasters, Inc.*, 40 FCC 2d 1239 (1971).

5. Upon review of the application it appears that US Sprint L.P. is fully qualified to acquire the common carrier authorizations currently held by US Sprint and to assume control of Telenet and CCI.

6. Accordingly, IT IS ORDERED, that the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TRANSPONDER LEASING CORPORATION — File Nos. 2761-DSS-ML-87, 2762-DSS-ML-87

Request for Reassignment of Orbital Locations for SBS-5 and SBS-6 Domestic Fixed-Satellites

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1988; Released: November 21, 1988

By the Chief, Common Carrier Bureau:

INTRODUCTION AND BACKGROUND

1. Satellite Transponder Leasing Corporation (STLC) requests modification of the Commission's *1985 Orbit Assignment Order* [1] to reassign its 12/14 GHz SBS-6 domestic fixed-satellite from 62' W.L. (West Longitude) to 99' W.L.[2] GE American Communications (GE Americom) filed an Opposition to STLC's request. American Telephone and Telegraph Company (AT&T), GTE Spacenet Corporation (GTE Spacenet), American Satellite Company (Contel ASC) and Geostar Corporation (Geostar) filed comments. STLC previously filed a modification request in which it asked the Bureau to reassign its SBS-5 and SBS-6 satellites to 97' and 95' W.L., respectively. That modification application was dismissed without prejudice because the Bureau could not conclude that the orbital locations sought by STLC at the time would be available for reassignment in the requested time periods. [3] STLC states that this second amended request addresses the basis of the dismissal of its first request and provides sufficient new information to justify favorable action for reassigning the SBS-6 satellite. For the reasons discussed below, we deny STLC's request.

2. STLC, a wholly-owned subsidiary of International Business Machines Corporation (IBM), acquired the SBS-4, SBS-5 and SBS-6 satellites as part of the transfer of control of Satellite Business Systems (SBS) from IBM to MCI Communications Corporation (MCI).[4] The SBS-4 satellite is currently operating from the 91' W.L. location. The SBS-5 satellite was launched in September 1988 and will operate from 123' W.L. STLC holds an option for a 1991 Arianespace launch for its SBS-6 satellite. However, STLC is currently negotiating with certain United States Expendable Launch Vehicle (ELV) program participants with a view of securing an earlier launch date, preferably in the November 1989 timeframe.

DISCUSSION

3. Initially, we find it proper to consider STLC's request at this time. The commenters argue that grant of the STLC request outside of the current domestic fixed-satellite processing round[5] would subvert the Commission's group processing policy and limit the ability of the Commission to accommodate the current group. The commenters urge the Bureau to delay action on STLC's request until the Commission acts on the other pending satellite applications.[6] Contrary to the commenters' contentions, the Bureau is not required to consider the STLC reassignment request with the current processing group. The original orbital assignment for the SBS-6 satellites was made in the *1985 Orbit Assignment Order* and STLC initially requested the reassignment well in advance of the current group's formation.[7] The Bureau is now merely acting on a request to modify that assignment order. This action does not reduce the number of available orbital locations. Therefore, STLC's request can be reviewed and disposed of on its merits at this time.

4. STLC's request that SBS-6 be reassigned to 99' is based on the assertion that, due to SBS-6's 50-state coverage design, the 62' W.L. location to which it is currently assigned would severely impair its very small aperture terminal (VSAT) service offerings and would preclude it from serving Alaska and Hawaii.[8] The Commission has consistently stated, however, that its flexibility to assign orbital locations that best serve the public interest cannot be limited by applicants' requests for assignment of particular orbital locations. In general, when assigning orbital locations, the Commission balances an applicant's request with several competing factors that include: the volume and distribution of traffic requirements; constraints imposed by satellite design; plans of other countries for their satellites; and equitable treatment of existing and new domestic satellites operators. Moreover, Commission policy is to afford new entrants, when possible, at least one initial orbital location in the portion of the orbital arc that allows 50-state coverage.[9]

5. Orbital locations between about 60' and 135' W.L. provide a minimum 10' earth station elevation angle throughout the contiguous 48-states. The Commission has stated that minimum 10' elevation angles are desirable at 12/14 GHz to reduce the impact of increased propagation impairment at these higher frequencies.[10] Thus, the Commission has assigned locations between 62' W.L. and 136' W.L. to 12/14 GHz domestic fixed-satellites.[11] However, the range of orbital locations that provide 10' elevation angles throughout the 50 states is considerably smaller, therefore yielding considerably fewer orbital locations. As a result, all satellites cannot be assigned to locations capable of providing 50-state coverage. To provide equitable treatment to licensees, the Commission assigns each at least one orbital location from which 50-state coverage can be provided, when possible.[12] In the past, the Commission has intentionally earmarked certain orbital locations, including ones capable of providing 50-state coverage, for assignment to new entrants.[13]

6. The Commission already has assigned STLC two 12/14 GHz satellite orbital locations from which 50-state coverage can be provided. SBS-4 is currently operating from 91' W.L. and SBS-5 is located at 123' W.L. Grant of STLC's request to reassign SBS-6 to 99' W.L. would allow STLC to provide 50-state coverage from all of its assigned locations and would reduce the number of 50-state coverage locations available for assignment to new entrants.

While there could be circumstances under which we might grant a request similar to STLC's, those circumstances do not exist here.[14] Absent compelling reasons to the contrary, we will continue to hold available 50-state coverage locations at this time.[15] Therefore, we deny STLC's request.

7. Accordingly, IT IS ORDERED that Satellite Transponder Leasing Corporation's Application File No. 2762-DSS-ML-87 to reassign the SBS-6 satellite to the 99° W.L. orbital locations IS DENIED.

8. IT IS FURTHER ORDERED that Application File No. 2761-DSS-ML-87 IS DISMISSED at the applicant's request.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Assignment of Orbital Location to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 35528 (August 30, 1985) (*1985 Orbit Assignment Order);* Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983) (*1983 Assignment Order).*

[2] STLC also requested that its SBS-5 satellite be reassigned but subsequently withdrew that request. We will therefore dismiss that portion of STLC's application.

[3] Satellite Transponder Leasing Corporation, 2 FCC Rcd 5416 (1987) (*STLC I).*

[4] *See* Public Notice, Report No. DS-463 (November 6, 1985). *See also* Satellite Business Systems, Mimeo No. 2629 (February 14, 1986).

[5] In response to Public Notice, Report No. DS-635 (released June 10, 1987), seven applicants filed applications for new or replacement domestic fixed-satellites by the September 15, 1987 cut-off date. These applications will be considered together as the current domestic fixed-satellite processing group.

[6] Geostar asserts that grant of STLC's request would significantly reduce the probability that the Commission would assign a "suitable" orbital location to GTE Spacenet's GSTAR IV satellite, which was to contain a Geostar transmit/receive radiodetermination satellite service (RDSS) payload. Geostar asserts that it deserves comparative consideration with STLC under the doctrine enunciated in Ashbacker v. FCC, 326 U.S. 327 (1945), and that the Commission should consider ensuring the viability of its RDSS payload by assigning GSTAR IV to a location from which the payload may effectively operate. Geostar has subsequently informed the Commission, however, that it no longer intends to place the RDSS package on GSTAR IV. *See* application for Digital Land Mobile Satellite System filed by Geostar on June 16, 1988. Thus, Geostar's concerns regarding the orbit location assigned to GSTAR IV are moot.

[7] STLC's original request for reassignment of SBS-5 and SBS-6 was filed in March 1987.

[8] A satellite positioned at 62° W.L. cannot be "seen" from earth stations stationed in the farthest reaches of Alaska and Hawaii.

[9] *See 1985 Orbit Assignment Order, supra* note 1, at paragraphs 3 and 17.

[10] *See 1985 Orbit Assignment Order, supra* note 1, at n. 16.

[11] *Id.*, at paragraph 6.

[12] *See, e.g., 1985 Assignment Order, supra* note 1; *1983 Assignment Order, supra* note 2.

[13] *See, e.g., 1985 Assignment Order, supra* note 1, at para. 6; *1983 Assignment Order, supra* note 2, at para. 33.

[14] For example, a different result might be warranted here if STLC, as the result of the restructuringof SBS, was left with no locations capable of 50-state coverage.

[15] If the Commission changes its policy to reserve orbital locations for future groups, STLC may file a request to use one of these locations.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 21, 1988

UNITED TELEPHONE SYSTEM, INC. FILES ADDITIONAL COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required telephone companies with more than100 million in operating revenues to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. On July 7, 1988, the Common Carrier Bureau conditionally approved the United Telephone System's cost allocation manuals. *See United Telephone Systems, Inc.'s Permanent Cost Allocation Manuals for the Separation of Regulated* and *Nonregulated Costs*, 3 FCC Rcd 4151 (1988).

On November 2, 1988, United Telephone System filed a cost allocation manual for United Telephone Company of Missouri, which will become fully subject to the *Joint Cost Order* effective **January 1, 1989.**

Comments on the manual may be filed no later than **December 7, 1988.** Replies should be filed by **December 19, 1988.** Comments should reference file number AAD 7-1688. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036.

Copies of the manual may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-88-208

Application for authority to lease and operate facilities for direct service to Guatemala.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 8, 1988; Released: November 21, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 21, 1988, by MCI Telecommunications Corporation, (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for provision of direct service between the U.S. and Guatemala and beyond. The application was placed on public notice on September 28, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Guatemala by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-208 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between an appropriate earth station on the east coast of North America and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Guatemala, furnished by MCI's correspondent in Guatemala;

b. obtain from AT&T and operate 24 voice-grade circuits in the east coast earth station;

c. lease and operate 24 voice-grade circuits between the east coast earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice services, between the U.S. and Guatemala and beyond.

The Commission retains jurisdiction to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Guatemala, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-214

Application for authority to acquire and operate facilities for service to Aruba.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: November 8, 1988; Released: November 21, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 30, 1988 by American Telephone and Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, and operate facilities for direct service between the U.S. and Aruba and beyond. The application was placed on public notice on October 5, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct telecommunications services to Aruba by AT&T.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-214 IS GRANTED, and AT&T is authorized to:

a. use for service to Aruba, its one-half interest in 20 voice-grade circuits in the Third Florida-St. Thomas Cable and the Netherlands Antilles Cable currently assigned for service to the Netherlands Antilles;

b. acquire from Lands Radio and Telegrafdinest on an IRU basis, and operate a one-half interest in 20 voice-grade circuits in the Caracao - Aruba microwave system;

c. lease from Comsat and operate 20 Intermediate Data Rate (IDR) satellite circuits between an appropriate earth station on the east coast of North America and an appropriate INTELSAT satellite over the Atlantic Ocean Region, connecting with similar circuits between the satellite and an earth station in Aruba, furnished by AT&T's correspondent in Aruba; and

d. use said facilities to provide AT&T's regularly authorized services between the U.S. and Aruba and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the Communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AT&T and its correspondent in Aruba, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its adoption date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of an IRU agreement between AT&T and Lands Radio and Telegrafdinest, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO. W-P-C 6136

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Acquire Digital Transmission Capacity from General Communications, Inc. for Services from Hawaii to Alaska

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1988; Released: November 21, 1988

By the Chief, Common Carrier Bureau:

1. The American Telephone and Telegraph Co. (AT&T) filed the above-referenced application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire from General Communications, Inc. (GCI) digital transmission capacity for the purpose of providing communications services from Hawaii to Alaska. The State of Alaska (Alaska) and the State of Hawaii (Hawaii) have filed comments. Alascom, Inc. (Alascom) has filed a Petition to Deny or in the Alternative Hold in Abeyance. For the reasons stated below, we grant the application.

BACKGROUND AND APPLICATION

2. In the above-referenced application AT&T seeks authority to acquire transmission capacity from GCI's point of presence (POP) in Honolulu to various points in Alaska for the purpose of providing interstate Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS) originating in Hawaii and terminating in Alaska. For approximately 85 percent of such services GCI would provide all necessary transport from GCI's POP in Honolulu to GCI's earth station in Alaska via GCI's authorized satellite facilities. GCI would provide capacity to Alaska points from the earth station by means of its own satellite or terrestrial facilities or by arrangements with connecting carriers in Alaska. The remaining 15 percent of AT&T's Hawaii to Alaska traffic would be routed by GCI to its Seattle earth station and from there to Alaska over facilities of other interexchange carriers. GCI would also arrange to provide operator and directory assistance for the AT&T traffic. These arrangements would remain in effect for two years, terminable thereafter on six-months notice by either party.

3. The proposed arrangements with GCI would replace in part arrangements for Alaska-Hawaii service AT&T and Alascom jointly provide pursuant to an Interim Agreement between the two carriers entered into in June 1986, and submitted to the Commission pursuant to Section 211 of the Communications Act (Act), 47 U.S.C. § 211.[1] Under the Interim Agreement, traffic is routed through AT&T's POP in Seattle. Traffic between there and AT&T's POP in Honolulu is carried by AT&T's authorized satellite and terrestrial facilities and traffic between AT&T's POP in Seattle and Alaska locations by Alascom's satellite and terrestrial facilities. The Interim Agreement applies to MTS, WATS, and 800 service. Under the Interim Agreement, AT&T and Alascom recover their costs through settlements based on costs determined in accordance with the prescribed separations manual in effect at the time of settlements. Rates for Hawaii to Alaska traffic are filed by AT&T and rates for Alaska to Hawaii traffic are filed by Alascom. Rates are designed to recover costs of service including settlement costs and allowable rate of return. The Interim Agreement explains that Hawaiian Telephone Company (Hawtel) local facilities were technically unable to route calls for AT&T's customers from Hawaii to Alaska in any other fashion than use of Alascom's network until such time as AT&T obtains a POP in Hawaii which does not use Hawtel's facilities,[2] that AT&T expected to have its own such facilities on or before January 1, 1988, and that in light of these facts Alascom and AT&T wished to enter into interim arrangements for provision of service between Alaska and Hawaii, without prejudice to their respective positions concerning permanent arrangements for such service.

4. As submitted to the Commission, the Interim Agreement bore an expiration date of December 31, 1987. On November 2, 1987 Alascom filed in CC Docket 83-1376[3] a motion requesting that AT&T be required to continue to participate in Hawaii-Alaska service pursuant to the Interim Agreement until the completion of that proceeding. The Common Carrier Bureau (Bureau) subsequently granted Alascom's motion to the extent of requiring continuation of the Interim Agreement service arrangements until resolution of the issues raised in the instant application.[4] The Bureau observed that it did not expect that action on the instant application would take place before the Interim Agreement expired. Thus, the Bureau concluded that it was in the public interest for AT&T to continue providing service jointly with Alascom pending resolution of the issues presented by AT&T's Section 214 application. 3 FCC Rcd at 356.

CONTENTIONS

5. Alascom contends that AT&T's attempt to depart from service arrangements with Alascom violates *Domsat II* and *Integration of Rates and Services* and that grant of the application would violate Commission policy designed to assure that Alascom, not AT&T, provide direct service to Alaska. It claims that the Commission has required AT&T to connect with Alascom in the lower 48 states. AT&T has no authority for a POP in Alaska and it should not be allowed to circumvent interconnection requirements by acquiring facilities from GCI, Alascom contends. It argues that AT&T's application should be denied because it is an effort to rescind Alascom's existing Section 214 authority to provide Hawaii-Alaska MTS/WATS. Alascom also argues that existing AT&T/Alascom service arrangements provide for MTS/WATS service throughout the fifty states and on every service route, that the proposed service arrangement with GCI would cover only

Hawaii to Alaska traffic, is entirely different than service arrangements which prevail for all other United States routes, and, therefore, is unreasonably and unlawfully discriminatory under Section 202(a) of the Communications Act.

6. Alascom contends that the Alaska Joint Board in CC Docket 83-1376 is considering the overall market structure for Alaska service, including Alaska-Hawaii service, the Alascom/AT&T joint service arrangement, the competitive balance between Alascom and AT&T and whether AT&T should be authorized to serve Alaska directly. The Joint Board now has compelete record before it and these issues are ripe for determination, states Alascom. It argues that these matters should be left to the Joint Board; a narrow authorization proceeding should not be used to make *de facto* decision on the course of service between Alaska and Hawaii. Indeed, grant of the application would improperly prejudge issues before the Joint Board and thereby nullify the opportunity for state participation the joint board process is meant to provide. Accordingly, if the application is not denied or dismissed, administrative fairness, consistency and sound discretion require that the instant application be considered only after the fundamental market issues in CC Docket 83-1376 are decided, avers Alascom. Alascom states that holding the application in abeyance will cause no hardship for AT&T as the current service arrangements are fully compensatory to AT&T.

7. Alascom also contends that the proposed service arrangements are less efficient and more expensive than the current network configuration. AT&T would incur payments to GCI of253,000 plus unspecified connecting charges in Hawaii under the proposed arrangements, according to Alascom.[5] Efficiency would also suffer, states Alascom, because AT&T proposes to maintain Alaska to Hawaii traffic under present service arrangements while sending only northbound traffic over GCI facilities. Alascom argues that this bifurcation of traffic is inefficient and will jeopardize quality of service. Alascom's network is built to quality standards whereas GCI is subject to virtually no regulatory oversight, contends Alascom. Further, with respect to northbound traffic, as stated by AT&T, only 85 percent of it would be carried directly by satellite from Hawaii to Alaska. The remaining 15 percent of MTS/WATS traffic and all 800 traffic would be routed to Seattle and then transmitted to the Alascom/AT&T network. This would be largely traffic to points that GCI does not serve, according to Alascom. Thus, states Alascom, northbound traffic would also be bifurcated resulting in loss of trunking efficiency. The AT&T proposal would also result in wasteful duplication of facilities, contends Alascom, in that GCI would have to install new facilities in Hawaii, Anchorage, Juneau and Fairbanks.

8. AT&T states that it entered into the Interim Agreement only for technical reasons, that it anticipated that it would be able to resolve technical limitations by the termination date of the Interim Agreement, which date was selected for that reason, and that it has in fact eliminated the technical limitations by acquiring in Hawaii toll switching and operator service facilities. Once the technical necessity for the Interim Agreement was eliminated, AT&T relates that it solicited bids for terminating its Hawaii-originated traffic in Alaska, that GCI submitted the most favorable bid, and that Alascom did not submit a bid.

9. Cost considerations support grant of the application, according to AT&T. Alascom offers no arguments or data, contends AT&T, to rebut the fact that under both the existing arrangements and the instant proposal AT&T will keep exactly the same facilities, but that under the GCI alternative it would pay its connecting carrier significantly less than for the service Alascom provides. More specifically, AT&T states that it will pay GCI for transmission capacity under the proposed arrangement at the per-minute and non-recurring rates which would be applicable for such services under AT&T's MEGACOM tariff.[6] This will enable AT&T to pay for this service on a minutes of use basis enabling it to significantly reduce its payments to other carriers for Hawaii-to-Alaska service, and its overall cost of service, states AT&T. AT&T will also pay a special access charge to the Hawaiian Telephone Company for transmission service between AT&T's and GCI's POPs in Honolulu, it states. The proposed service arrangements will also enable it to avoid the circuitous routing through Seattle for 85% of Hawaii-to-Alaska traffic, states AT&T.

10. AT&T states that it does not propose any changes in tariffs or rate structure for Hawaii to Alaska service. Thus, the application does not raise a rate integration issue, a matter before the Joint Board, states AT&T. The application is, however, a step towards lowering AT&T costs for Alaska service and the subsidies which AT&T's other ratepayers must pay to support offshore services. AT&T argues that such subsidies handicap AT&T's ability to respond to price competition and that the Commission should grant the application as a step toward lowering the subsidies borne by mainland ratepayers. As long as mainland ratepayers subsidize offshore services, states AT&T, Alascom will have little incentive to lower cost, or improve service or efficiency. AT&T states that Alascom's request to hold the application in abeyance pending CC Docket 83-1376 is a request for indeterminate delay, especially since Alascom itself may seek to prolong that proceeding. AT&T states that it is unable to address Alascom's arguments that the proposed service arrangements are illegal under, or precluded by, Commission orders or are unlawfully discriminatory since those arguments are without factual support.

11. Hawaii urges that the Commission take the opportunity presented by the AT&T application to order that Hawaii to Alaska services be rate integrated. Hawaii supports efforts to provide Hawaii-Alaska services in the most cost efficient manner, but AT&T has made no statement that any cost savings from its proposed service arrangements will be passed on to consumers. Hawaii does not assert that AT&T should be required to make arrangements with Alascom or any other carrier, only that service be rate integrated. Alaska similarly points out that the Commission has determined that Alaska-Hawaii service, like all other routes, should be rate integrated, citing *Integration of Rates and Services, supra; AT & T Co. Long Lines Department*, 66 FCC 2d 3, 57, n. 70 (1978); *Common Carrier Separation Procedures*, 72 FCC 2d 715, 717 (1979). It states that rate integration is necessary if Alaska is to be a part of the national telecommunications network. It urges the Commission to require that Alaska-Hawaii service be provided at rate integrated rates. Alascom states that rate integration is official Commission policy, citing *Domsat II*, and that AT&T is required to provide service at integrated rates to and among the noncontiguous states including Alaska and Hawaii.

DISCUSSION

12. We first discuss allegations that the proposed service arrangements would be unlawful and/or are barred by Commission decisions, and whether action on the application should be deferred pending completion of CC Docket 83-1376. We then discuss whether Hawaii to Alaska service should be rate integrated. Finally, we discuss whether the public interest would be served by grant of the application. Issues include cost of service, possible efficiencies of the proposed service arrangements, and the Commission's policy of competitive entry in the Alaska telecommunications market.

13. *Lawfulness of the proposed service arrangements.* In *MTS and WATS Market Structure Inquiry* (Phase II), 92 FCC 2d 787 (1982), *recon. denied*, FCC 82-213, released May 9, 1983, the Commission opened the Alaska interstate telecommunications market to competition, subject to a limited exception prohibiting duplication of facilities in bush communities. Alascom vigorously opposed this action. While the CC Docket 83-1376 Joint Board and the Commission will consider the relationship between rate integration and competitive entry policies for Alaska services, the Commission has not sought to stay competitive entry or otherwise forestall marketplace developments pending its ultimate policy determinations.[7] The authorities cited by Alascom do not prohibit authorization of additional direct service to Alaska, and Alascom has not explained on what basis those decisions would prohibit AT&T's proposed service arrangements, especially in light of the the subsequent *MTS and WATS Market Structure Inquiry*. Alascom's allegation of unreasonable discrimination is conclusory, unsupported, unexplained and fails to raise a substantial issue under Section 202(a) of the Act. AT&T is under no permanent outstanding order to interconnect exclusively with Alascom for Hawaii to Alaska traffic. Therefore, the Commission's competitive entry policy for Alaska service remains in full force and effect, and authorization of such entry, including that which may affect present service arrangements with Alascom, is neither unlawful nor barred under any Commission decision.

14. *Deferral of the application pending CC Docket 83-1376.* Alascom contends that consideration of the AT&T proposed service arrangements should be deferred pending completion of CC Docket 83-1376 because the application could affect, or be affected by, that proceeding. As indicated, in CC Docket 83-1376 the Commission is considering, *inter alia*, what market structure changes are necessary to harmonize the Commission's pro-competitive and rate integration policies for the Alaska interstate communications market. In considering the AT&T application, we are considering a single facilities authorization, not the overall market structure and rate integration policy for Alaska service. Nor are we considering other issues involved in that docket such as separations procedures. In addition, the Commission has not sought to terminate or forestall marketplace changes that may affect, or be affected by, that proceeding, including those requiring Commission authorization.[8] Delaying action on AT&T's Section 214 application would not be consistent with Commission findings that the public interest is best served by competitive entry by interexchange carriers in providing service to Alaska, notwithstanding any modifications that subsequently may issue.[9] Further, the record provides no basis to conclude that the impact of today's action will be negative, or will preclude the Joint Board from addressing any issues in that docket. For these reasons, therefore, we reject Alascom's contentions that consideration of the application should be deferred pending completion of CC Docket 83-1376.

15. *Rate Integration.* Hawaii and Alaska urge that Alaska-Hawaii service be rate integrated. The specific issue of whether Alaska-Hawaii service should be rate integrated has been referred to, and is before, the Joint Board. *Supplemental Notice of Proposed Rule Making*, CC Docket No. 83-1376, 2 FCC Rcd 607 (1987). Thus, in contrast to facilities authorization and/or competitive entry issues concerning an individual applicant for the Alaska telecommunications market, it would be most consistent with CC Docket 83-1376 not to seek to implement rate integration for Alaska-Hawaii service prior to the completion of that proceeding. Therefore, we will not order rate integration with respect to the present application.

16. *Cost of Service.* AT&T contends that the proposed service arrangements with GCI will result in lower costs for Hawaii to Alaska service in that the payments to GCI under the proposed rates will be less than settlement payments to Alascom under the Interim Agreement. The proposed payments to GCI are based on a nationwide rate averaged service (MEGACOM) while settlements to Alascom are based on the historically high costs for service to Alaska. AT&T has fully described the proposed rates and estimates of minutes of use and total estimated charges.[10] While Alascom contends that the proposed service arrangements have not been shown to be less expensive than current arrangements, it has failed to present any evidence showing that present service arrangements are less expensive, even though it clearly knows what AT&T's settlement payments to it have been under the Interim Agreement. Therefore, we find that Alascom has failed to rebut AT&T's contention that the proposed service arrangements will reduce the cost of service.[11]

17. *Efficiencies.* AT&T also contends that the proposed service arrangements will achieve routing efficiencies in that 85 percent of Hawaii to Alaska traffic will be directly transmitted to Alaska instead of being routed over separate links through Seattle. In general, direct communications routes provide a greater degree of efficiency than will two or more communications paths between the same originating and terminating locations. While not all Hawaii to Alaska traffic will be transmitted in this fashion and southbound traffic, according to Alascom, would continue to be transmitted in the present fashion, on balance we believe that the more direct link for nearly half of the traffic subject to the Interim Agreement represents a net increase in direct routing efficiency under the proposed service arrangements. Moreover, in measuring efficiency, all uses of the facilities, not just the Hawaii-Alaska traffic usage, must be considered. Alascom has failed to address overall usage; nor has it shown that the proposed service arrangements will result in trunking inefficiencies.

18. *Open Entry Policy.* AT&T is not currently authorized to provide communications service from Hawaii directly to Alaska. Therefore, while it presently offers such service pursuant to the intercarrier agreement with Alascom, with each carrier providing service on its respective authorized communications segment, grant of the application would authorize additional direct service in the Alaska market. In *MTS and WATS Market Structure, supra*, the Commission determined that competitive entry into the Alaska communications market would result in the public interest benefits of price competition, lower prices to the public and greater consumer choices in ser-

vice features. 92 FCC 2d at 841. Further, as new entrants participate, it is inevitable that carriers may seek to alter existing, and form new, service arrangements. AT&T has sought to take advantage of opportunities afforded by the Commission's competitive entry policy by seeking to establish more direct and cost effective service arrangements. It represents that GCI submitted the lowest bid, and that Alascom did not participate. Alascom has failed to present any reason why AT&T should be denied the anticipated benefits of the Commission's competitive policies. Further, based on AT&T's representations, our authorization today should result in lower costs for services. For these reasons, the AT&T proposed service arrangements, and its application for authority to enter into them, are a result of, anticipated by, and fully consistent with the Commission's open entry policy for Alaska service. As such, we find that the previously enumerated public interest determinations in *MTS and WATS Market Structure* also support grant of the instant application.

19. In the view of the foregoing, therefore, the Bureau concludes that grant of the application would serve the public interest because it would make service possible at reduced cost, because routing efficiencies could be achieved, and because the application would be consistent with, and serve to implement, the policies adopted in *MTS and WATS Market Structure*.

20. *Alaska to Hawaii Service*. AT&T seeks authorization for Hawaii to Alaska traffic. It states that for southbound traffic it will offer to Alascom standard intercarrier agreements for the purpose of terminating such traffic in Hawaii. Alascom has stated that present arrangements will continue for such traffic. These statements are somewhat conflicting; it is not clear what the status of service arrangements for southbound traffic will be if the Interim Agreement is terminated with respect to it as well as for Hawaii to Alaska traffic. Accordingly, we will maintain the Interim Agreement in effect for Alaska to Hawaii traffic in order to avoid service disruption until the completion of CC Docket 83-1376 or further order.

21. Accordingly, IT IS CERTIFIED, that acquistion and operation of the facilities described in the application of American Telephone and Telegraph Co., File No. W-P-C 6136 IS REQUIRED by the public convenience and necessity.

22. IT IS ORDERED, that this authorization IS SUBJECT TO the outcome of CC Docket 83-1376 including, but not limited to, alteration and/or termination of the service arrangements authorized and rates for services provided thereby.

23. IT IS FURTHER ORDERED, that the Interim Agreement IS TERMINATED with respect to Hawaii to Alaska traffic at such time as service arrangements authorized herein are effectuated, BUT IS MAINTAINED IN EFFECT for Alaska to Hawaii traffic pending completion of CC Docket 83-1376 or further order.

24. IT IS FURTHER ORDERED, that failure to notify the Commission in writing within thirty days of the release date of this memorandum opinion and order that the authorization as conditioned is unnaceptable will constitute acceptance thereof. In the event of such notification, this authorization is void pending further order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* letter from respective counsel, Alascom and AT&T, to Secretary, Federal Communications Commission, June 5, 1986. Section 211 of the Act provides in part that "[e]very carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party."

[2] The letter transmitting thelnterim Agreement to the Commission explained that:

> . . . .Hawtel's toll switch and operator facilities in Hawaii cannot accommodate more than one interexchange carrier where such carrier employs Hawtel's toll switch as its point of presence (POP). Accordingly, technical constraints prevent both AT&T and Alascom from independently providing Hawaii-Alaska services, because both carriers currently employ Hawtel's toll switch as their switching and operator services POPs. Thus, until AT&T deploys its own switch and operator services facilities now planned for 1987, Hawaii-Alaska service must be provided by AT&T and Alascom jointly. . . .

Letter from respective counsel, Alascom and AT&T, to Secretary, Federal Communications Commission,June 5, 1986.

[3] In *Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands*, Notice of Proposed Rule Making, CC Docket 83-1376, 50 Fed. Reg. 41714 (Oct. 15, 1985), the Commission, *inter alia*, established a Joint Board pursuant to section 410(c) of the Communications Act of 1934, as amended. The Commission asked the Joint Board to submit recommendations on several issues including: (1) what, if any, market structure changes are necessary to harmonize the Commission's rate integration and pro-competitive policies for the Alaska interstate telecommunications market; (2) what separations or other Commission rule changes, if any, would be necessary to implement any market structure changes; and (3) whether the Commission's rate integration and pro-competitive policies should apply to the Alaska-Hawaii route. *See also Supplemental Notice of Proposed Rule Making*, 2 FCC Rcd 607 (1987). Rate integration is the Commission policy that services between the contiguous states and Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands generally be provided at rates that are equivalent to those prevailing for comparable distances in the contiguous states. *Establishment of Domestic Communications Satellite Facilities*, 35 FCC 2d 844, 856-857 (*Domsat II*), *aff'd sub nom., Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975). *See also Integration of Rates and Services*, 62 FCC 2d 693 (1976); *Integration of Rates and Services*, 87 FCC 2d 25 (1981).

[4] *Memorandum Opinion and Order*, CC Docket 83-1376, DA 87-1908, 3 FCC Rcd 356 (1987).

[5] Alascom also contends that the proposed service arrangements will be more expensive to AT&T if the Commission orders rate integration for Alaska-Hawaii MTS/WATS. This is because, according to Alascom, in recent decisions the Commission has frozen cost allocation factors between Alascom and AT&T at 1985 levels and because in 1985 Hawaii traffic was classified for

separations purposes as foreign, citing *Recommended Decision and Order*, CC Docket No. 80-286, 2 FCC Rcd 2551, 2564-65; *Report and Order*, CC Docket No. 80-286, 2 FCC Rcd 2639 (1987).

[6] AT&T Communications Tariff F.C.C. No 1, Long Distance Message Telephone Service, Section 6.5 *et seq*.

[7] Therefore, although Alascom is correct that the service arrangements under the Interim Agreement have been mandated, this has been done only pending action on the present application. Therefore, termination or alteration of the present service arrangements in conjunction with action on the present application is consistent with that mandate.

[8] For example, the Commission has not sought to forestall, and has accepted pursuant to motion by Alascom, *see* para. 4, *supra*, the service arrangements for Hawaii-Alaska service provided for under the Interim Agreement. In addition, the Commission has allowed during the pendency of CC Docket 83-1376 the implementation of the final step of rate integration for MTS/WATS service between Alaska and the contiguous states. *See Integration of Rates and Services*, CC Docket 83-1376, 2 FCC Rcd 2442 (1987).

[9] Communications services and facilities for Alaska services, both existing and those that may be authorized by the Commission in the future prior to the conclusion of CC Docket 83-1376, are subject to the outcome of CC Docket 83-1376. *See* para. 23, *infra*.

[10] In addition to payments to GCI, AT&T will entail some costs for local transmission service from AT&T's POP to Hawtel facilities.

[11] Alascom's contention that the cost of Hawaii-Alaska northbound service will be increased if it is provided at integrated rates is unpersuasive. Alascom has failed to show that the cost of the service arrangements described in the application will be affected by the rates charged for it.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-138

In the Matter of

Inquiry Into the Availability of
Broadcast Television Signals on
Cable Television Systems

ORDER REOPENING THE PERIOD FOR FILING COMMENTS

Adopted: November 10, 1988; Released: November 21, 1988

By the Chief, Mass Media Bureau:

1. By this *Order*, we are reopening the above-captioned proceeding to afford parties an opportunity to comment on two reports that have been added to the record. These reports are: *Cable System Broadcast Signal Carriage Survey Report*, September 1, 1988, a staff report by the Policy and Rules Division, Mass Media Bureau of the FCC; and *Broadcast Station Carriage Survey*, September, 1988, a report prepared by the Research and Policy Analysis Department of the National Cable Television Association. We request that parties limit their comments to the information presented in these reports. The reports are available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919 M Street NW, Washington, D.C. Copies of the reports can also be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 2100 M Street N.W., Washington, D.C. 20037.

2. Accordingly, IT IS ORDERED, pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, That the period for filing comments in the above captioned proceeding is REOPENED to and including **December 21, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

3. For further information concerning this proceeding, contact Scott Roberts, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-224

In the Matter of

Amendment of Section 73.202(b),	RM-5706
Table of Allotments,	RM-5888
FM Broadcast Stations.	
(Perryville, Missouri and Benton and Granite City, Illinois)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 4, 1988; Released: November 21, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 3829 (1987), proposing the substitution of Channel 293C1 in lieu of Channel 293C2 at Granite City, Illinois, and modification of the license of Station WKBQ (formerly KWK-FM), Channel 293C2, Granite City, to specify operation on Channel 293C1. This channel substitution and license modification requires the substitution of Channel 226A in lieu of Channel 294A at Perryville, Missouri (RM-5888). A separate petition for rule making was filed by Lanmar Broadcasting, Inc., licensee of Station WQRL-FM, Channel 292A, Benton, Illinois, proposing the substitution of Channel 292B1 in lieu of Channel 292A at Benton and modification of the Station WQRL-FM license to specify operation on Channel 292B1 (RM-5706). Inasmuch as these proposals are in conflict, they were consolidated into this proceeding. Chase Broadcasting of St. Louis, Inc. (Chase Broadcasting), licensee of Station WKBQ, and Lanmar Broadcasting, Inc. filed comments. Tri-County Broadcasting filed a counterproposal. DLB Broadcasting Corporation filed a "Request for Further Notice of Proposed Rule Making" and "Comments on Withdrawal of Counterproposal."[1] Lanmar Broadcasting, Inc. filed reply comments and Chase Broadcasting filed reply comments and supplemental reply comments.

BACKGROUND

2. Chase Broadcasting proposed the channel substitution at Perryville and Granite City in order to permit the grant of its pending application to relocate the Station WKBQ transmitter site, increase antenna height and power, and gain Class C1 status (File No. BPH-840821AS). This would improve service to Granite City and provide a larger service area. Similarly, the conflicting Benton proposal will provide for a larger service area and, according to Lanmar Broadcasting, eliminate shadowing and distortion resulting from a Class A facility. In order to evaluate these competing proposals, the *Notice* specifically requested that initial comments include the populations and square miles of the respective gain areas. We also requested information concerning the availability of other aural services in those areas. This information would then be evaluated in reply comments.

3. On September 1, 1988, Lanmar Broadcasting, Inc. requested dismissal of its petition for rule making. Accordingly, we will dismiss the Benton, Illinois proposal, substitute Channel 226A in lieu of Channel 294A at Perryville, Missouri,[2] and substitute Channel 293C1 in lieu of Channel 293C2 at Granite City, Illinois.[3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 5, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to read as follows:

City	Channel No.
Granite City, Illinois	285A, 293C1
Perryville, Missouri	226A

5. IT IS FURTHER ORDERED, That the petition for rule making filed by Lanmar Broadcasting, Inc. proposing the substitution of Channel 292B1 in lieu of Channel 292A at Benton, Illinois and modification of the Station WQRL-FM license to specify operation on Channel 292B1 (RM-5706) IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Tri-County Broadcasting, an applicant for the Perryville allotment, proposed the substitution of Channel 295C2 at Perryville in lieu of Channel 294A. This required the substitution of Channel 244A at Woodlawn, Illinois, in lieu of Channel 295A. In regard to this counterproposal, DLB Broadcasting Corporation requested the Further Notice of Proposed Rule Making in order to solicit comments on the proposed channel substitution at Woodlawn. Subsequently, Tri-County Broadcasting withdrew this counterproposal. Accordingly, the Tri-County Broadcasting counterproposal is hereby dismissed and the Request for Further Notice of Proposed Rule Making and Comments on Withdrawal of Counterproposal filed by DLB Broadcasting Corporation need not be considered.

[2] There are two applications pending for the Channel 294A allotment at Perryville, Missouri. The applicants are Tri-County Broadcasting (File No. BBH-861124MK) and DLB Broadcasting Corporation (File No. BPH-861126NG). A Channel 226A allotment at Perryville meets the minimum spacing requirements at

the sites specified in both of these applications. These applicants will be permitted to amend their applications to specify the new channel without loss of cut-off protection.

[3] The reference coordinates for Channel 293C1 at Granite City, Illinois are 38-34-24 and 90-19-30. Inasmuch as BPH-840821AS was pending prior to the reclassification of Class B and Class C stations pursuant to BC Docket No. 80-90, allotting Channel 293C1 to Granite City is merely an editorial amendment to the FM Table of Allotments designed to avoid the need to make a separate editorial amendment as a result of the grant of the application for Channel 293C1 at Granite City. The Station WKBQ license will be modified upon grant of the covering license application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-522

In re Applications of

V. O. B. INCORPORATED File No. BPH-871102MH
(hereafter VOB)

IOWA RADIO LIMITED PARTNERSHIP File No. BPH-871103MB
(hereafter IRLP)

RICHARD AND STEPHANIE HERMANN d/b/a DICK BROADCASTING, LTD. File No. BPH-871104MD
(hereafter DBL)

WILLIAM B. ROTH File No. BPH-871104MG
(hereafter Roth)

For Construction Permit for a
New FM Station on Channel 292A (106.3 MHz),
Ankeny, Iowa

HEARING DESIGNATION ORDER

Adopted: October 26, 1988; Released: November 21, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On May 31, 1988, VOB filed a petition to deny against the application of IRLP alleging that it had been inadvertently accepted for tender since "the application was apparently for Channel 292A, [while] the engineering portion was for a Class C2 station on Channel 223C2." VOB argued that under Appendix D to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the presence of the inconsistent identification of the channel number and community of license in FCC Form 301, Section 1, Item 2(a) – Channel 292A, Ankeny, Iowa – and in the engineering study at Section V-B – Channel 223C2, Ankeny, Iowa – must "be treated as functionally the equivalent of the absence of such data," and thus render the application insufficient for tender. VOB further asserted that the Commission cannot conclude that the application mistakenly specified Channel 223C2 because "every aspect of the engineering proposal is designed for a station utilizing [that] channel . . . ."

3. We reject this argument. Although the Commission concluded in *Mary L. Smith d / b / a Radio Roswell,* 2 FCC Rcd 722 (1987) *(Smith),* that inconsistent identification of channel number and community of license rendered the application untenderable, the instant facts are distinguishable. In *Smith,* Mid-America Gospel Radio Network, Inc. requested Channel *263C,* Roswell, New Mexico, on the first page of its application; the engineering study, however, was prepared for Channel *293C* in that community. The resulting ambiguity could not be resolved because the windows for filing applications for both channels in Roswell, New Mexico were open at the same time. In the instant case, however, we can take official notice of the fact that at the time IRLP filed its application, only one window, for Channel 292A, was open for Ankeny, Iowa, and therefore 292A was the intended channel. *See, e.g., Mableton Broadcasting Co., Inc.,* 3 FCC Rcd 5357 (1988)(HDO); *Carta Corporation,* 3 FCC Rcd 798 (1988)(HDO); *Hartke Communication, Inc.,* 2 FCC Rcd 7508 (1987)(HDO). Consequently, the application was correctly deemed to be sufficient for tender. Furthermore, since IRLP's January 22, 1988 engineering submission was timely filed as an amendment as of right and provided corrected data as to Channel 292A, the underlying application was not rendered unacceptable for filing. Consequently, VOB's petition to deny must, in all respects, be denied.

4. *VOB.* In response to Section II, Item 7 of FCC Form 301 (1986 ed.), VOB reported that its president, Steven Van Oort, is employed as station manager of radio stations WWJ and WJOI(FM), Detroit, Michigan. VOB states in its application that Mr. Van Oort will resign his position at WWJ and WJOI(FM) upon a grant of the instant application. Accordingly, a condition reflecting this commitment will be specified below.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 2-3 hereinabove, VOB's petition to deny the application of IRLP IS DENIED.

8. IT IS FURTHER ORDERED, That in the event of a grant of VOB's application, the construction permit shall be conditioned as follows:

Prior to commencement of program test authority, permittee shall certify to the Commission that Steven Van Oort has resigned his position as Station Manager at WWJ and WJOI(FM), Detroit, Michigan.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-521

In re Applications of

JOSEPHINE M. RODRIGUEZ d/b/a CIELO COMMUNICATIONS (hereafter Cielo)	File No. BPH-870917MC
BAER BROADCASTING CORPORATION (hereafter Baer)	File No. BPH-870918MG
RICHARD PALMQUIST (hereafter Palmquist)	File No. BPH-870918MM
DIANE N. LANDEN (hereafter Landen)	File No. BPH-870918MP
OMAHA METRO BROADCASTING, INC. (hereafter Metro)	File No. BPH-870918NA
OMAHA FM BROADCAST LIMITED PARTNERSHIP (hereafter Limited)	File No. BPH-870918NI
FREEDOM BROADCASTING NETWORK, INC. (hereafter Freedom)	File No. BPH-870918NP

For Construction Permit for a
New FM Station, Channel 290A, 105.9 MHz
Omaha, Nebraska

HEARING DESIGNATION ORDER

Adopted: October 26, 1988; Released: November 21, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Baer.* On May 27, 1988, Landen filed a petition to deny against Baer alleging that the applicant had failed to sign its application (Section VII, page 2 of FCC Form 301). Landen argues that this failure renders the application not substantially complete in accordance with the procedures established in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), and accordingly it should be returned as untenderable. We have examined the three copies of Baer's application and have discovered that this Section is not completed on all three copies. However, Baer has signed the application in two other places where a signature is required (Section VII, page one, "site certification" and the model EEO program included as part of Section VI to the form). We believe that FCC Form 301 is not a model of clarity with respect to required signatures and that the certification statement in Section VII and the Model EEO program are essentially the same. This can result in confusion on the part of the applicant. The certification in Section VII states, "I certify that the statements in this application are true, complete and correct to the best of my knowledge and belief, and are made in good faith." The Model EEO certification is "I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith." In view of the similarity of the two certifications and the fact that Baer has signed in two of the three required places, we consider its application to be substantially complete and will deny Landen's petition.

3. *Metro.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Metro has not completed Item 4 correctly. Metro's application gives a business address for two of its principals, Mr. Richard W. Chapin and Mr. Charles Thone. Accordingly, Metro must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *Limited.* The applicant has indicated that Mr. Larry Littlejohn, the general partner in the Limited application, is a shareholder of LDH Communications, the licensee of KBWH(FM), Blair, Nebraska. Mr. Littlejohn has stated his intention to divest his interest in LDH Communications if Limited receives a construction permit as a result of this proceeding. Accordingly, an appropriate divestiture condition will be specified.

5. *Freedom.* On January 14, 1988, Freedom petitioned to amend its application to specify a new transmitter site. Freedom states that the Federal Aviation Administration (FAA) has expressed concern about its tower as originally proposed. Metro has opposed Freedom's late-filed amendment. Numerous additional pleadings have also been received from the parties.[1] Metro's opposition states that, as set forth in Freedom's petition, the applicant was notified of the FAA's concerns with its tower on July 31, 1987, approximately three months prior to the filing of Freedom's application; thus Freedom erred when it certified that it "had reasonable assurance that [its] site was available *for its intended purpose.* " In its motion to strike, Freedom has stated that the July 31, 1987 date was a typographical error made by its counsel. As an exhibit to its opposition, Freedom has furnished a copy of the FAA's notice of potential hazard which is dated November 9, 1987. Furthermore, the Commission has been able to verify through its Antenna Survey Branch that November 9, 1987 was the correct date of the FAA Notification of Proposal Hazard letter. Finally, good cause has been shown for acceptance of Freedom's January 14, 1988

amendment, since it was diligently filed upon learning of the FAA objections. Accordingly, Metro's opposition will be denied.

6. *Other Matters.* Cielo, Baer, Palmquist, Landen, and Limited have requested a waiver of 47 C.F.R. § 73.315(a), principal city coverage. The staff has determined that their proposals are in substantial compliance with this rule. *See John R. Hughes,* 50 Fed. Reg. 5679 (1985). Accordingly, their requested waivers will be dismissed as moot.

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Palmquist, Limited and Freedom would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Landen	March 29, 1988
Freedom	January 14, 1988 (engineering)

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Palmquist, Limited and Freedom would constitute hazards to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That Landen's petition to deny filed against Baer IS DENIED.

13. IT IS FURTHER ORDERED, That Metro shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That if a construction permit is awarded to Limited as a result of this proceeding, Mr. Larry Littlejohn shall divest all interest in and sever all connections with LDH Communications, the licensee of KBWH(FM), Blair, Nebraska.

15. IT IS FURTHER ORDERED, That Metro's opposition to Freedom's January 14, 1988 amendment IS DENIED.

16. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) filed by Cielo, Baer, Palmquist, Landen, and Limited ARE DISMISSED AS MOOT.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Landen (3/29/88) and Freedom (1/14/88).

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] These include Freedom's opposition to Metro's opposition to Freedom's petition for leave to amend, a motion to strike Metro's opposition filed by Freedom and an opposition to Metro's motion filed by Freedom.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-523

In re Applications of

BRYAN DAVIDSON (hereafter Davidson)	File No. BPH-870917MG
CR BROADCASTING (hereafter CR)	File No. BPH-870918ME
SAGA COMMUNICATIONS (hereafter Saga)	File No. BPH-870918MS
DANIEL S. STRATEMEYER (hereafter Stratemeyer)	File No. BPH-870918MZ

For the Construction Permit for a
New FM Station on Channel 271B1,
Mt. Vernon, Illinois

HEARING DESIGNATION ORDER

Adopted: October 27, 1988; Released: November 21, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *City coverage.* CR's proposal provides only 22.3 percent of city coverage. CR claims that due to a site restriction imposed to protect Station WRDW(FM), Eldorado, Illinois, it is impossible to achieve city-grade coverage of Mount Vernon from the permissible site location area. CR has not provided circumstances which warrant waiver of Section 73.315(a) of the Rules, particularly in light of all other applicants securing sites from which short-spacing with other stations would not occur and from which at least 80 percent of city coverage would be provided. *See Letter to Southwest Communications, Inc. from Dennis Williams, Acting Chief, FM Branch,* (Reference 8920-HVT), dated July 16, 1986 *John R. Hughes, et al.*, 50 Fed. Reg. 5679 (1985). Accordingly, an appropriate issue will be specified.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Two applicants have indicated their interest in terminating their respective relationships with stations in which they have ownership interests. Davidson has promised to divest his interests in Stations WJBD and WJBD-FM, Salem, Illinois. Similarly, Stratemeyer has promised to divest his interests in Stations WRAJ and WRAJ-FM in Anna, Illinois. Accordingly, in the event of grant of either of these applications, the appropriate applicant will be required to sever all connections with its respectively aforementioned stations prior to the commencement of program test authority.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after last date for filing minor amendments as of right. Under 47 C.F.R. Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	DATE OF AMENDMENT
CR	February 4, 1988; March 31, 1988
Stratemeyer	July 25, 1988

6. *Air hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Stratemeyer would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposal of CR would provide coverage of the city sought to be served, as required by 47 C.F.R. § 73.315(a), and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Stratemeyer would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That, in the event of grant of Davidson's or Stratemeyer's application, the appropriate applicant will be ordered to divest himself of all

interests in and sever all connections with the corresponding stations enumerated in paragraph 4 of this Order prior to the commencement of program test authority.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: CR, Stratemeyer.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

WILLIE A. JEFFERSON D/B/A OPPORTUNITY BROADCASTING OF SHREVEPORT (hereafter Opportunity)	File No. BPH-870814MK
SHREVEPORT RADIO LIMITED PARTNERSHIP (hereafter SRLP)	File No. BPH-870819MX
NTW, INC. (hereafter NTW)	File No. BPH-870820ME
PORT CITY COMMUNICATIONS L. P. (hereafter Port City)	File No. BPH-870820MH
MARCOM (hereafter Marcom)	File No. BPH-870820MI
KYMHILKYLAA BROADCASTING COMPANY, INC. (hereafter KYMHILKYLAA)	File No. BPH-870820MO
A.T. MOORE D/B/A NOR - MAX BROADCASTING CO. (hereafter Nor-Max)	File No. BPH-870820MP
INNOVATIVE WOMEN'S MEDIA ASSOCIATION (hereafter Innovative)	File No. BPH-870820MQ
CADDO BROADCASTING LIMITED PARTNERSHIP (hereafter Caddo)	File No. BPH-870820MR
RICHARD H. WILCOX D/B/A KNWL, LIMITED, A PARTNERSHIP IN COMMENDAM (hereafter KNWL)	File No. BPH-870820MT

For Construction Permit for a
New FM Station on Channel 275C2 in
Shreveport, Louisiana

HEARING DESIGNATION ORDER

Adopted: October 28, 1988; Released: November 21, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters*. Nor-Max and KWNL request a waiver of 47 C.F.R. § 73.315 which requires that applicants provide a 3.16 mV/m (70 dBu) signal to the entire proposed city of license. Nor-Max's proposal provides the requisite coverage to more than 99% of the principal community and KNWL covers 91% of the principal community. The Commission does not require waiver of 47 C.F.R § 73.315 unless the proposed 70 dBu coverage falls below 80% of the area of the proposed city of license. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Accordingly, no waiver is required and the requests of Nor-Max and KNWL will be dismissed as moot.

3. NTW and Innovative propose to mount their antennas on an existing tower owned by Bellor Communications, Inc. (Bellor) which is licensed for KNHH 472. Commission records showed the geographic coordinates for the KNHH 472 tower as 32' 34' 35" North Latitude, 93' 52' 03" West Longitude at a ground elevation above mean sea level (AMSL) of 91 meters. However, the geographic coordinates and ground elevation have been found to be in error. The correct coordinates are 32' 34' *32* " North Latitude, 93' 52' *06* " West Longitude at a ground elevation of *85* meters AMSL. Consequently, the Commission's data base has been changed to reflect the correct geographic coordinates and ground elevation AMSL. Bellor has also been informed of the correct data. Likewise, the Federal Aviation Administration (FAA) has been notified of the error in geographic coordinates and ground elevation for the tower as of this date; however, the FAA has not cleared these parameters. Innovative has listed the erroneous geographic coordinates (32' 34' 35" North Latitude, 93' 52' 03" West Longitude) and the erroneous ground elevation AMSL (91 meters) for the existing tower in Section V-B, Items 2b and 7(a)(1) of FCC Form 301. Innovative also plots the ground elevation AMSL for the tower at 76 meters on its site map, which is lower than the 91 meters previously found in the Commission's data base and in Section V-B. However, Innovative's inconsistent use of the erroneous data for the existing tower does not render its application unacceptable for filing. At the time Innovative filed its application, it listed data consis-

tent with Commission records for the geographic coordinates and ground elevation AMSL of the existing tower. Innovative's inconsistent plot of the existing tower's ground elevation AMSL did not affect the acceptability of its application since Innovative clearly proposed to locate on an existing tower licensed to an Commission licensee and because reference was made to the existing tower in its application. Therefore, the staff could confidently and reliably verify the pertinent tower height by taking official notice of the tower parameters found in the Commission's records at the time the application was filed for the licensed facilities. Furthermore, even though Innovative plotted the existing tower at a ground elevation of 76 meters AMSL, Innovative's proposal still maintained Class C2 status. Because the Commission was notified of the error in its data for the existing tower subsequent to Innovative's filing of its application, Innovative will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order correcting the tower height and the geographic coordinates listed for the tower and plotted in its application. Additionally, NTW's application contains a discrepancy with respect to the overall height above mean sea level (AMSL) of the tower. Using the correct site elevation (85 meters) and tower height (189 meters), the correct tower height AMSL should be 274 meters. NTW lists the tower height as 288 meters AMSL. While this discrepancy does not affect the acceptability of NTW's application, the applicant will be required to file an amendment with the presiding Administrative Law Judge correcting its tower height within 30 days of the release of this Order.

4. In response to Section VI, FCC Form 301, KNWL has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 296A, the 5-Point Model EEO Program. The EEO program submitted by KNWL is incomplete because it fails to identify specific sources of recruitment specializing in women which will be used to attract women job applicants. Accordingly, KNWL will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Marcom and Port City have received clearance from the Federal Aviation Administration (FAA) for their respective antennas which are proposed for the same site. The FAA has cleared each proposal for an antenna height of 499 feet above ground level (AGL). However, Marcom and Port City proposed to mount their antennas on towers of 538 feet AGL and 531 feet AGL, respectively. Port City has filed an amendment to specify the lower tower height, which indicates that it also notified the FAA of proposed construction of the new, lower tower. However, because the Commission has been unable to obtain clearance of Port City's amended proposal through its Antenna Survey Branch, an air hazard issue will be specified below. Marcom will be required to file an amendment specifying the appropriate tower height AGL for its proposal with the presiding Administrative Law Judge within 30 days of the release of this Order. Also, Marcom will be required to notify the FAA of its intention to construct its proposed lower tower within 30 days of the release of this Order and an air hazard issue will be specified below. A copy of both the amendment and the notification to the FAA shall be filed with the Chief, Audio Services Division.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by SRLP, NTW, Port City, Marcom, and/or Nor-Max would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the residence address of each of its principals. Marcom and Caddo have not completed Item 4 correctly. Marcom fails to give any addresses for it or its principals, Mark C. Pizzolat and Mary W. Buckman. Caddo gives a post office box number as the residence address for its principal Claudette M. Green. Accordingly, Marcom and Caddo must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by SRLP, NTW, Port City, Marcom, and/or Nor-Max would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That for the reasons stated in paragraph 2 hereinabove, the requests of Nor-Max and KNWL for waiver of 47 C.F.R. § 73.315 ARE DISMISSED as moot.

11. IT IS FURTHER ORDERED, That NTW and Innovative shall submit amendments in accordance with paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, KNWL shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That, Marcom shall submit an amendment in accordance with paragraph 5 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That Marcom and Caddo shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An application filed by American Indian Broadcast Group, Inc. (BPH-870820MD) was returned by staff letter of March 4, 1988 as unacceptable for filing. No petition for reconsideration of this action has been filed. An application filed by Rochelle Lucas d/b/a Carpenter Broadcasting (BPH-870820MU) was returned by the Commission's Fee Section on September 17, 1987. Thereafter Carpenter filed a petition for reconsideration of this action. The Managing Director granted Carpenter's petition on December 11, 1987 and reinstated the application *nunc pro tunc*. Carpenter's application was subsequently found to be acceptable for tender; public notice of this finding was released on June 17, 1988. However, Carpenter's application was returned by staff letter of August 31, 1988 as not acceptable for filing. Carpenter did not file a petition for reconsideration of this action. Additionally, due to the late tenderability period opened on June 17, 1988 by Carpenter, various amendments filed by the competing applicants, which otherwise would have been late-filed will be considered to be filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration of Docket 84-750, 50 Fed. Reg. 43157 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-272

In the Matter of

OYATE, INC.

Order to Show Cause Why the License of KQHU-FM Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

OYATE, INC. File No. BTCH-851205HO

Licensee of Station KQHU-FM
Yankton, South Dakota

For Consent to the Transfer of Control

In re Application of

OYATE, INC. File No. BTCH-851205HP

Licensee of Station KQHU-FM
Yankton, South Dakota

For Consent to the Transfer of Control

In re Application of

OYATE, INC. File No. BAPLH-880115GV

Licensee of Station KQHU-FM
Yankton, South Dakota

For Involuntary Assignment of the License of KQHU-FM to William F. Turner, Trustee in Bankruptcy

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1988; Released: November 22, 1988

By the Commission: Commissioner Dennis dissenting and issuing statement.

1. Before the Commission are: (1) an Application for Review filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy; (2) a Petition for Expedited Action filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy; (3) a Petition for Extraordinary Relief filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy; (4) a [second] Petition for Expedited Action filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy; (5) the Mass Media Bureau's Consolidated Opposition to Oyate's [sic] Petition for Extraordinary Relief [,] Application for Review, and Petitions for Expedited Action filed May 18, 1988; (6) a Reply of Trustee in Bankruptcy to Mass Media Bureau's "Consolidated Opposition" filed May 27, 1988; (7) the Mass Media Bureau's Comments on Reply of Trustee in Bankruptcy to Mass Media Bureau's "Consolidated Opposition" filed June 7, 1988; (8) a Response to Mass Media Bureau's Comments filed June 9, 1988 by Turner; (9) the Mass Media Bureau's Reply to the Response of the Trustee filed June 20, 1988; (10) Response of Trustee in Bankruptcy to Mass Media Bureau's Reply filed June 27, 1988; (11) the Mass Media Bureau's Further Comments filed August 5, 1988; and (12) the Response of Trustee in Bankruptcy to Mass Media Bureau's Further Comments filed August 12, 1988. These pleadings involve Turner's proposal to assign station KQHU-FM in Yankton, South Dakota to Flagship Communications, Inc. and thereby terminate this hearing proceeding. On June 10, 1988, the Commission stayed further action in this proceeding pending consideration of these matters. *Oyate, Inc.*, 3 FCC Rcd 3940 (1988).

I. BACKGROUND

2. On July 31, 1987, the Commission designated for hearing the question of whether the license of Oyate, Inc. for station KQHU-FM in Yankton, South Dakota should be revoked. *Oyate, Inc.*, 2 FCC Rcd 4528 (1987). This matter arose from allegations that: (1) control of the station had been transferred without prior Commission approval as required by 47 U.S.C. § 310(d); (2) misrepresentations had been made to the Commission concerning the ownership of the station; and (3) documents relating to the ownership of the station were not filed with the Commission as required by 47 C.F.R. § 73.3613(b). *See also* Bill of Particulars filed August 3, 1987.

3. Because some of the particulars of these allegations bear on the petition for extraordinary relief before us, we will describe them in detail. On October 15, 1982, Willis Stanage, then Oyate's majority stockholder, allegedly transferred his interest in Oyate to Robert Link, a minority stockholder. Later, on October 17, 1985, Link allegedly entered into an agreement to transfer control of Oyate to North American Storage, Inc., a corporation owned by William Deam. On December 5, 1985, the parties filed an application for transfer of control to North American Storage and an application retroactively covering the prior transfer from Stanage to Link. These applications are both still pending, because they have been designated for hear-

ing along with the question of revocation. However, Deam allegedly assumed actual control of the station despite the fact that the Commission has not yet granted him authority to do so.

4. Another matter is also relevant to both the hearing and the petition for extraordinary relief. On February 11, 1986, Deam allegedly entered into an agreement with Lawrence Magnuson, giving Magnuson an exclusive option to purchase KQHU-FM. Allegedly, Oyate failed to report this option to the Commission in a timely manner under the Commission's rules. Magnuson states in a deposition that he exercised the option and, on May 15, 1986, placed the 599,000 purchase price in an escrow account at the American State Bank of Yankton, South Dakota (of which Deam was then president and chief executive officer). Magnuson Deposition at 21-22. *See also* Deam Deposition at 39.

5. After the Commission designated these and related allegations for hearing, Oyate, on October 2, 1987, sought relief under Chapter 11 of the Bankruptcy Code (reorganization) with the United States Bankruptcy Court for the District of South Dakota, Southern Division. On December 14, the court appointed William F. Turner as Trustee in Bankruptcy. On April 5, 1988, the Mass Media Bureau, acting under delegated authority, approved the involuntary assignment of KQHU-FM from Oyate to Turner "subject to the outcome of the proceeding in MM Docket No. 87-272."

II. RELIEF REQUESTED

6. Turner now asks the Commission to terminate this hearing proceeding and allow him to assign KQHU-FM to Flagship Communications, Inc., which is wholly owned by Magnuson. The purchase price would consist of the 599,000 already on deposit with the American State Bank. Assets Purchase Agreement at 7-8. Turner asserts that such relief would be consistent with the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). This policy represents an exception to the general rule that a licensee may not freely transfer its station while there is an unresolved issue pending against it concerning its qualifications to be a licensee. *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). Under *Second Thursday*, a bankrupt licensee in hearing may transfer its station if:

> . . . the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [renewal and assignment] applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. [citations omitted]

22 FCC 2d at 516 ¶ 5. The *Second Thursday* doctrine "accommodates the policies of federal bankruptcy law with those of the Communications Act." *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974).

7. Turner's supporting arguments and the Mass Media Bureau's objections are contained in several rounds of pleadings. Although a number of these pleadings are not authorized by the Commission's rules, we have examined them in an effort to resolve this troublesome matter. In his initial submission, Turner urged that the proposed assignment to Flagship complies with the standard set forth in *Second Thursday*. He maintained that approving the assignment would eliminate the need to resolve the designated issues, thereby conserving both Oyate's and the Commission's resources and ensuring the continued operation of the station. He further maintained that the public interest favors permitting the trustee in bankruptcy to freely exercise his authority to protect innocent creditors. Moreover, according to Turner, no alleged wrongdoers would benefit from the assignment because neither he nor Magnuson is an accused wrongdoer. Turner admitted that North American Storage, which is owned by Deam, is creditor of Oyate. However, Turner assured the Commission that Deam would derive no benefit from the transaction because he has declared bankruptcy in Phoenix, Arizona.

8. The Mass Media Bureau argued in response that the proposed assignment is inconsistent with the balancing of interests set forth in *Second Thursday*. The Bureau contended that Turner did not account for how the proceeds of the sale will be used to benefit innocent creditors. According to the Bureau, the record suggests that the sale would primarily benefit Deam, an accused wrongdoer. The Bureau observed that Deam testified in a deposition that after Magnuson deposited the 599,000 in escrow at the American State Bank, Deam, through North American Storage, immediately borrowed a like amount from the bank. Deam Deposition at 39-40. The Bureau claimed that the proceeds of the sale would be used to pay Deam's debt to the bank rather than any debt of the licensee. In this regard, the Bureau pointed out that, in documents filed with the bankruptcy court, the American State Bank is listed as *Oyate's* largest creditor, in the amount of 599,000. (All other liabilities listed total only about 30,000.) The Bureau suggested that the debt to the American State Bank may represent Deam's liability, not Oyate's.

9. The Bureau also suggested that the filing of the bankruptcy petition may have been motivated primarily by an intention to forestall inquiry into Deams's unauthorized control of Oyate. The Bureau charged that Deam exercised operational control over the station, although his transfer of control application was never approved by the Commission. (Turner had asserted that any question as to whether the bankruptcy proceeding has been prosecuted fraudulently is within the primary jurisdiction of the bankruptcy court.)

10. In reply, Turner elaborated on the status of Deam's bankruptcy proceeding and on Oyate's obligation to the American State Bank and other creditors. Turner proffered a letter from Oyate's bankruptcy lawyer, Rick A. Yarnall, as to these matters. Letter from Rick A. Yarnall to Erwin Krasnow (May 25, 1988).[1] Yarnall stated that Deam filed for protection under Chapter 7 of the Bankruptcy Code (liquidation) on December 1, 1987 (two months after Oyate's bankruptcy petition was filed). Deam does not claim his stock in North American Storage as exempt property and assigns it a value of 0.00. As to the American State Bank claim against Oyate, Yarnall explained that the bank loaned Oyate 599,000 on an open account to acquire new operating equipment and for operating funds. Later, on October 2, 1987, the day Oyate filed for bankruptcy, the bank converted the open account to a secured promissory note (signed by Deam) against all of Oyate's real and personal property. Yarnall offered the

opinion that, because the bank obtained its security interest the same day Oyate filed for bankruptcy, the security may be voided. Yarnall further reported that the American State Bank has recently been taken over by the FDIC, which has injected 3-4 million to keep the bank solvent, and that the bank was later sold to First Dakota National Bank, another Yankton Bank. According to Yarnall, if the Commission does not approve the *Second Thursday* sale, the FDIC will have to bear additional losses.

11. The Bureau then questioned the accuracy and completeness of the information furnished by Turner. It asserted that the information furnished concerning Deam's bankruptcy did not fully dispel the possibility that he would benefit from the proposed sale. The Bureau observed that the documents submitted showed that Deam had at least 1 million in assets, but that those documents did not reveal the extent or nature of his liabilities. Thus, the Bureau inferred that, if he were to benefit by an additional 599,000, his financial situation might be significantly improved. The Bureau also renewed its contention that the American State Bank's claim actually represents a loan to Deam and not to Oyate. The Bureau cited additional deposition testimony by Deam indicating that, of the 592,000 he borrowed, only 45,000-50,000 was used to purchase broadcast equipment. Deam testified that 112,000-113,000 went to pay obligations already owed the American State Bank; 100,000 went to Deam to cover the amounts expended in purchasing Oyate from Link; 30,000 went for miscellaneous expenses; and 300,000 went for purposes Deam could not recall. Deam Deposition at 55-57.

12. Turner thereupon supplemented the information he had previously submitted. In a second letter, Yarnall elaborated on his assertion that Deam could not benefit from the sale because of his bankruptcy. Letter from Rick A. Yarnall to Erwin Krasnow (June 9, 1988). Yarnall explained that the documents filed in Deam's bankruptcy proceeding (which Yarnall included with his June 9 letter) indicate that Deam lists approximately 3 million in liabilities against a little over 2 million in assets. However, chief among Deam's listed assets is stock in American Banshares, Inc., which formerly owned the American State Bank. Yarnall related that, according to bank officials, this stock was rendered worthless by the involuntary merger of the American State Bank with the First Dakota National Bank (on May 18, 1988). Yarnall also indicated that the value of real estate listed by Deam was exaggerated. Thus, Yarnall concluded that Deam's liabilities actually exceed his assets by roughly 2 million. Although Yarnall had no direct information about the assets and liabilities of Deam's company, North American Storage, he cited circumstantial evidence that the company probably has little worth. Deam's bankruptcy filing lists the company as having no value; the company owes the American State Bank 375,000; and the company owns a substantial amount of now worthless stock in American Banshares.

13. Turner also proffered a letter by Michael Ridgway, an attorney for the bank, regarding its claim against Oyate. Letter from Michael E. Ridgway to the FCC (June 9, 1988). Ridgway explained that on February 18, 1986, Deam, as president of Oyate, assigned Oyate's interest in the Magnuson purchase option to the bank and that the bank later transferred 592,000 to Oyate with Magnuson's escrow money as collateral. Ridgway asserted that the bank's claim against Oyate is valid and that the bank has no recourse against the insolvent Deam or North American Storage if the Commission does not approve the sale of KQHU-FM. Ridgway further asserted that if the sale is not approved the bank will suffer a substantial loss.

14. Despite this supplemental showing, the Bureau continued to question the information furnished by Turner. The Bureau reiterated its claim that the bank is not a legitimate creditor of Oyate. The Bureau proffered a copy of the document in which Oyate (under Deam's signature) assigned to the bank its interest in any money received from Magnuson and a copy of the letter in which Magnuson attempted to exercise his purchase option for KQHU-FM. According to the Bureau, these documents are contingent on Commission approval and thus Deam could give the bank no interest in the Magnuson escrow money without such approval. Moreover, because Deam served as the president of the bank at that time, the Bureau contended that the bank should be held accountable for Deam's knowledge that he had no authority to transfer any interest in KQHU-FM to the bank. The Bureau also contended that Deam's bankruptcy papers confirm that the bank's claim is actually against North American Storage and Deam and not Oyate. The Bureau pointed out that these papers list a 375,000 claim by the bank against North American Storage, for which Deam is the guarantor. In the Bureau's view, this represents the unpaid remainder of "Oyate's" 592,000 debt.

15. Additionally, the Bureau continued to question the information concerning Deam's financial condition. It argued that the papers submitted by Turner leave open the possibility that Deam has equity in a Cessna aircraft valued atl million. It also argued that Turner failed to document his assertion that Deam's stock and real estate are worth less than the value stated in Deam's bankruptcy papers.

16. In response to the Bureau's continued objections, Turner submitted still more information in the form of a further letter from the bank's attorney, Ridgway. Letter from Michael E. Ridgway to the FCC (June 27, 1988). Ridgway explained that the bank's 592,000 claim against Oyate is separate from the 375,000 owed by Deam and North American Storage. According to Ridgway, the latter obligation represents the remaining liability associated with an 875,000 line of credit to North American Storage. Additionally, Ridgway contends that, regardless of whether Deam had Commission authorization to control Oyate, the bank has a valid claim against Oyate under state law and bankruptcy law.

17. Ridgway also provided further information as to Deam's assets. He asserted that Deam had no equity in the Cessna aircraft listed in the bankruptcy filing, because Deam assigned his interest to Cen-Lease, Inc., a subsidiary of the American State Bank. Subsequently, according to Ridgway, Cen-Lease sold the plane to a third party. As to the American Banshares stock, Ridgway related that the FDIC has prohibited stockholders in the American State Bank and American Banshares from profiting from the reorganization of the bank. He reports that, in a recent deposition, Deam acquiesced in the FDIC's condition and conceded that the stock is valueless. Ridgway reiterates that there has been no appraisal of Deam's real estate and maintains that the bank asserts a first mortgage against all of Deam's real estate.

18. Subsequently, in yet another round of pleadings, the Bureau elaborated on its contention that the bank does not have a claim against Oyate. The Bureau submitted a declaration by Carmen Schramm, the general manager of

KQHU-FM from July 1897 to June 14, 1988, stating that she was unaware of any 599,000 debt to the bank until the claim was made in Oyate's bankruptcy proceeding. She further stated that there is no record of such a debt at the station and that she does not know the source of any such debt. Schramm declared that she was surprised when informed that Oyate was filing for bankruptcy because the station had no problem paying its bills. According to Schramm, she was told by Oyate's attorney that bankruptcy was the best way to prevent the station's license from being revoked. (Schramm stated that she signed a document in the bankruptcy proceeding at the request of Oyate's lawyer, but then, after having second thoughts, she resigned from Oyate.)

19. The Bureau also submitted a report from the FDIC and declarations from Steven M. Capitanio, the head of the bank's trust department from 1983 to 1987, and John Lillibridge, an officer and director of the bank from August to November 1987. These documents disclose the following events. On May 14, 1986, the bank made a loan of 592,000 to Oyate, secured by an assignment of the 599,000 in certificates of deposit held by the bank's trust department on behalf of Magnuson. On or about July 14, 1986, the trust department was requested (probably by Deam, according to Capitanio) to distribute the certificates, which were then distributed to Deam and used to pay the Oyate loan.

20. Later, in August 1986, Magnuson went to the bank and, concerned about the bank's financial situation, asked that the certificates of deposit be converted to treasury bills. When the bank learned that the certificates had already been distributed, it was required to repay Magnuson from its own funds. The bank then filed a claim with its insurance company for the funds. This claim has not been paid pending future legal action against Deam. Both Capitanio and Lillibridge express the opinion that the bank's claim is against Deam (or the insurance company) rather than Oyate. (Lillibridge stated that he approved a document, which Deam signed, purporting to give the bank a secured interest in the 599,000 in the event the FCC approved the transfer of KQHU-FM.)

21. Turner responds to this latest set of allegations by proffering a further letter from Ridgway, the bank's lawyer. Letter from Michael E. Ridgway to FCC (August 11, 1988). Ridgway reiterates his position that the bank continues to be a creditor of Oyate. He explains that when the bank was required to replace Magnuson's funds, Lillibridge, on behalf of the bank, entered into an memorandum agreement with Oyate, North American Storage, and Deam, dated October 2, 1987, that effectively revived Oyate's debt. The agreement (which is attached to Ridgway's letter) provides that Oyate and the other signatories are personally liable to the bank for the 599,000 (which was redeposited to Magnuson's account) and gives the bank a security interest in Oyate and its assets.

22. Ridgway also asserts that, under the Bankruptcy Code, the listing of the bank's claim as undisputed, and the failure of other parties in interest to object, renders the claim valid.

III. DISCUSSION

23. As the Bureau points out, the chief obstacle to approval of the proposed sale is the possibility that Deam, an accused wrongdoer, may benefit as a result of the sale. We agree with the Bureau that Turner's initial filings left substantial unanswered questions about Deam's financial status. However, Turner's supplemental filings provide significant additional information which alleviate these concerns. These filings indicate that Deam's liabilities greatly exceed his assets. In light of Ridgway's credible explanation, we find that Deam's principal assets consist of real estate valued at approximately 1 million against liabilities of approximately 3 million. Thus, Deam would not likely enjoy any benefit after discharge in bankruptcy even if the 599,000 were directly transferred to him. This case therefore resembles *Davis Broadcasting Co.*, 67 FCC 2d 872, 875 ¶ 9 (1977), in which the Commission found that an accused wrongdoer was bankrupt, leaving his creditors with little or no recourse, and making his personal liability inconsequential.

24. We further find that it is appropriate to treat the American State Bank (now the First Dakota National Bank) as an innocent creditor for purposes of the *Second Thursday* policy. As a legal matter, we find that Turner has made an adequate showing that there is a basis to regard the bank as a creditor of Oyate. The record indicates that the bank's claim against Oyate is undisputed, and, therefore, under the bankruptcy code deemed valid. *See* 11 U.S.C. §§ 502(a), 1111(a). That determination alone, however, is not dispositive. We agree with the Bureau that we could disapprove the bank's claim if, in our judgment, the circumstances warranted. The Bureau correctly notes that Oyate's -- and therefore the bank's -- interest in the Magnuson escrow money is contingent on Commission approval, which we could withhold in view of the alleged unauthorized transfers of control involving Oyate. However, after reviewing the record before us, we believe that this is a situation in which it would be contrary to the public interest to ignore that a bank and the FDIC are victims of Deam's alleged misuse of Oyate.

25. We find that the relevant facts are as follows. As indicated by the FDIC investigative report submitted by the Bureau, the bank, on May 14, 1986, made a 592,000 loan to Oyate. Although, as the Bureau points out, these funds were used by Deam for various purposes and not for Oyate's broadcast operations (and the loan may not have appeared in the station's records, as Schramm's statement suggests), the loan was carried on the bank's books as a loan to Oyate. Security for the loan consisted of the 599,000 in certificates of deposit put in escrow by Magnuson. The report and the statements of Capitanio and Lillibridge (also submitted by the Bureau) establish that on July 14, 1986, Deam obtained the certificates from the bank and used the proceeds to repay the debt. Because, the Commission had not yet approved the sale of KQHU-FM, the certificates should not have been taken out of escrow. Thus, this action resulted in the bank erroneously considering the debt as repaid and having to replenish the certificates from its own funds. The bank has sought several means of recourse for its loss including its attempt to obtain additional security from Deam and Oyate, an insurance claim for employee dishonesty, and possible legal action against Deam. At this point, however, there is no assurance that the bank will be reimbursed at all, and no likelihood that it will be reimbursed by Deam, who is bankrupt.

26. Because Deam caused a loss to the bank, we consider his actions adverse to the bank's interests, and we, therefore, do not think it appropriate to impute Deam's actions to the bank. We make this determination fully aware that the bank, after suffering its loss, has cooperated

with Deam to the extent of seeking to take advantage of the *Second Thursday* policy to make itself whole. Moreover, we find it significant that on May 18, 1988, the American State Bank was merged into the First Dakota National Bank under the supervision of the FDIC. Deam and other stockholders of the American State Bank were prohibited from profiting from this reorganization. In our view, this reorganization purges the bank of any taint that might be seen based on the past involvement of Deam in bank affairs. It is consistent with the philosophy of *Second Thursday* to aid the efforts of other agencies in overseeing insolvent financial institutions. For example, in *Davis*, the Commission exercised its discretion in applying *Second Thursday* to protect the rights of innocent creditors of an insolvent bank in proceedings by the Utah Commissioner of Financial Institutions. 67 FCC 2d at 874 ¶ 6. The fact that the proceeds of the sale should be sufficient to provide almost full recovery by Oyate's innocent creditors provides further public interest benefits in favor of the sale. *See*, for example, *Shell Broadcasting, Inc.*, 38 FCC 2d 929, 933 ¶ 11 (1973).

27. The sale will also serve the public interest by helping to ensure uninterrupted service by KQHU-FM and avoiding the necessity for prolonged operation by a trustee in bankruptcy as an interim operator. *See Hertz Broadcasting of Birmingham, Inc.*, 57 FCC 2d 183, 184 ¶ 5 (1976). We therefore approve the sale subject to further action by the Mass Media Bureau pursuant to its delegation of authority on the assignment application for station KQHU-FM.

IV. ORDERS

28. ACCORDINGLY, IT IS ORDERED, That the Petitions for Expedited Action filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy ARE GRANTED.

29. IT IS FURTHER ORDERED, That the Petition for Extraordinary Relief filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy IS GRANTED.

30. IT IS FURTHER ORDERED, That the following applications for transfer of control ARE DISMISSED as moot: BTCH-851205HO and BTCH-851205HP; and that this proceeding IS TERMINATED; provided that, if the assignment of KQHU-FM to Flagship Communications, Inc. is disapproved or is not consummated, the action taken herein shall be void.

31. IT IS FURTHER ORDERED, That, in view of our action, the Application for Review filed May 4, 1988 by William F. Turner, Trustee in Bankruptcy asking that the Commission delete language in the Mass Media Bureau's approval of the assignment of KQHU-FM to Turner, which conditions that action on the outcome of this hearing proceeding, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] In light of an attorney's obligation not to make a false statement in representing a client, we consider this, and similar letters, the equivalent of sworn declarations. *See* ABA Code of Professional Responsibility, DR 7-102(A)(5).

DISSENTING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Application for Review and Petition for Extraordinary Relief in the Yankton, South Dakota FM proceeding (MM Docket No. 87-272).

I disagree with the decision allowing Oyate, Inc., to assign the license of KQHU-FM to Flagship Communications, Inc., pending the Commission's review of the assignment application. The *Second Thursday* doctrine's purpose is to aid legitimate, innocent creditors of a bankrupt station. It is a limited exception to our *Jefferson Radio* policy, which provides that the FCC will not allow licenses to be assigned while a character issue is pending against the licensee. Typically, *Second Thursday* is applied to assist creditors who made loans with a reasonable expectation of being repaid. We permit the sale as a last resort to allow those creditors to be made whole.

I agree with the Mass Media Bureau that there is substantial doubt concerning the legitimacy of American State Bank's claim against Oyate. The 599,000 debt in this case had its genesis on May 14, 1986, when the bank loaned Oyate 592,000, using as collateral 599,000 deposited by Lawrence Magnuson, the sole owner of Flagship Communications. Magnuson made the deposit because he anticipated the FCC would approve the sale of KQHU-FM from Oyate to Magnuson. The money was to be transferred to Oyate once the Commission approved the sale. However, at the time the loan was made, Deam knew that Oyate was in no position to assign the license. In October, 1982, William Stanage transferred control of the station to Robert Link--without Commission approval. In October, 1985, Link agreed to transfer control to Deam. That transfer took place in late 1985 or early 1986--again, without Commission approval.

In May, 1986, when the loan was made, Deam, who had never been approved as a licensee by the Commission, knew or should have known that he did not have authority to transfer the license to Flagship. Nevertheless, Oyate's agreement with Flagship served as the basis for the loan. Since Deam at that time was President of American State Bank, as well as President of Oyate, the bank also should have known of Oyate's tenuous position before the Commission. Because of the two previous unauthorized transfers, FCC approval of the assignment to Flagship was obviously in doubt; the bank had no reasonable expectation that it would be repaid if Oyate withdrew

the money. So even as of May 14, it seems difficult to characterize the bank as an innocent creditor in making the loan to Oyate.

After that, the facts become even less favorable to Oyate. On July 14, 1986, with the assignment application still pending, William Deam distributed to himself the 599,000 deposited by Flagship and used it to pay off the 592,000 Oyate loan. Deam withdrew the money even though neither transfer had been approved by the Commission. By Deam's own admission, he used less than one-third of the money for station expenses. Deam stated in a sworn deposition that he used 45,000-50,000 to purchase broadcast equipment and 112,000-113,000 to pay off an existing Oyate loan to the bank. He said he used 100,000 to pay a personal debt and 30,000 to pay "miscellaneous" expenses. He said he could not recall how he spent the remaining 300,000. Nevertheless, American State Bank signed another agreement allowing Oyate to assume the entire debt on October 2, 1987, the same day that Oyate declared bankruptcy. In light of these facts, it is questionable whether the bank *ever* had a legitimate expection of being repaid by Oyate.

The evidence suggests that Oyate assumed the debt, and then declared bankruptcy, in an attempt to exploit the *Second Thursday* doctrine for its own advantage. Carmen Schramm, KQHU-FM's general manager, stated under oath that William Deam told her that declaring bankruptcy was the "best way to protect the station's license from being revoked."[1] She also stated that before the October 2 agreement with the bank, the station had had no problem paying its bills.[2]

American State Bank's conduct also raises other questions. First, the bank allowed Deam to withdraw the 599,000 deposited by Flagship. Second, when the bank discovered the missing 599,000, it filed a claim with its insurance company to recover the money, asserting that its policy covered employee dishonesty. Unlike most *Second Thursday* cases, the insurance claim opens up an alternative means for the creditor to be made whole.

John Lillibridge, an officer and director of American State Bank during the time the bank signed the agreement with Oyate, stated that, "the bank's proper recourse for recovery of the 599,000 lies against the [bank's] insurance company and/or William Deam."[3] Lillibridge further stated that as far as he knew, the claim has not been paid pending possible future legal action against Deam. There exists a strong possibility that the action taken in this case could directly benefit William Deam, by forestalling possible legal action against him regarding his appropriation of the 599,000. Rather than turn to the Commission for relief, the bank should first prosecute that claim.

For all the foregoing reasons, this case should be governed by the policy of *Jeffeson Radio*, rather than the *Second Thursday* exception. Therefore, I agree with the Mass Media Bureau that the Petition for Extraordinary Relief filed on May 4, 1988 by William F. Turner should be denied pending resolution of the unresolved character issues against Oyate.

FOOTNOTES FOR STATEMENT

[1] In her declaration, Carmen Schramm stated that in October 1987, "William Deam called me and informed me that he was filing bankruptcy on [sic] the station after the lawyer had been to the station... He told me that it was the best way to protect the license from being revoked. I then called several other lawyers... I was informed that there had been a conference call that morning and that all parties agreed that it was the best course of action to protect the license." *See*, Mass Media Bureau's Further Comments, August 5, 1988, at Attachment A (Declaration of Carmen Schramm).

[2] Ms. Schramm also stated: "I first learned of a 599,000 debt when we had our day in bankruptcy court. There was no record at the station or at the bank of such a debt and no demand was ever made of the station to pay on it." *See* Mass Media Bureau's Further Comments, August 5, 1988, at Attachment A (Declaration of Carmen Schramm).

[3] *See*, Mass Media Bureau's Further Comments, August 5, 1988, at Attachment D (Declaration of John Lillibridge).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-456

In the Matter of

Amendment of Section 73.606(b), RM-4632
Table of Allotments,
Television Broadcast Stations.
(Crandon, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 13, 1988; Released: November 22, 1988

By the Commission:

1. The Commission has before it for consideration the *Order to Show Cause* in this proceeding, 2 FCC Rcd. 6242 (1987), directed to WCCO Television, Inc., licensee of television Station WCCO-TV, Channel 4, Minneapolis-St. Paul, Minnesota. WCCO Television, Inc., was directed to show cause why its license should not be modified to specify a channel offset of "plus" in lieu of "zero".[1] This proposed modification would enable the Commission to allot Channel 4 to Crandon, Wisconsin as a first local television service. WCCO Television, Inc. filed a response to the *Order to Show Cause*.

BACKGROUND

2. The original *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 49 Fed. Reg. 21960, published May 24, 1984, proposed Channel 4 to Crandon and afforded WCCO Television, Inc. the right to a hearing upon request with respect to the proposed modification of its license. Subsequently, in response to legislation revising Section 316 of the Communications Act, we revised Section 1.87 of our Rules, the section which implements Section 316 of the Act.[2] *See Modification of FM and Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987). Under the revised rules, there is no longer an automatic right to a hearing upon request. Instead, the revised Section 1.87 of the Rules sets forth a notification requirement for the benefit of the affected licensee/permittee. The affected party must be notified of the proposed action and the resulting public interest benefits. In order to obtain a hearing, the licensee/permittee must now establish a substantial and material question of fact as to whether the proposed modification serves the public interest. In that action, we also stated that the new procedure would apply to pending proceedings. In order to insure that no prejudice would accrue to WCCO Television, Inc. in this proceeding, the subsequent *Order to Show Cause* informed WCCO Television, Inc. that under revised Section 316 of the Act and Section 1.87 of our Rules, it must raise a substantial and material question of fact to obtain a hearing and that failure to do so might result in an *Order* modifying its license.

3. In response to the *Order to Show Cause*, WCCO Television, Inc. refers to the provision that the eventual permittee of Channel 4 in Crandon will be required to reimburse Station WCCO-TV for the expenses incurred in changing the channel offset. [3] In this connection, WCCO Television, Inc. notes that neither it nor the Commission has any information as the financial ability of Forest County Television Company, the proponent of the Crandon allotment, to comply with the reimbursement requirement. WCCO Television, Inc. contends that this fact is relevant because Forest County Television Company specifically represented in comments that it would reimburse for the expenses of the change in offset at Station WCCO-TV. WCCO Television, Inc. contends that the absence of any documentation of a financial ability to meet such a commitment raises a substantial and material question of fact entitling it to a hearing.

DISCUSSION

4. WCCO Television, Inc. has not raised a substantial and material question of fact concerning the proposed modification of license sufficient to require a hearing. First of all, it is our experience that the total cost of changing a television channel offset is relatively modest and would not prevent the eventual permittee of the Crandon allotment from constructing the facilities and meeting its reimbursement requirement.[4] Furthermore, we do not believe that this show cause proceeding is the most appropriate forum to consider the financial ability of Forest County Television Company to meet the reimbursement requirement. This is for two reasons. First, it is premature to assume that Forest County Television Company will be the permittee of the Crandon television station. After the Crandon channel is allotted, it will be open to competing applications. Second, considering the overall financial qualifications of a party at the application stage is more conducive to the efficient transaction of Commission business. The application form (FCC Form 301) contains a separate section (Section III) specifically pertaining to the financial qualifications of the applicant. In the event that WCCO Television, Inc. wishes to raise any issue pertaining to the financial qualifications of a particular applicant for the Crandon television allotment, it may do so at the application stage. In the meantime, we do not perceive any reason to delay this rule making proceeding. We continue to believe that a first local television service to Crandon is in the public interest. Therefore, we will modify the Station WCCO-TV license and allot Channel 4 to Crandon, Wisconsin.

5. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), 0.283 and 1.420 of the Commission's Rules, IT IS ORDERED, That effective **January 5, 1989,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Crandon, Wisconsin	4
Minneapolis-St. Paul, Minnesota	4+

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, and Section 1.87 of the Commission's Rules, the license of WCCO Television, Inc., for Station WCCO-TV, Minneapolis-St.Paul, Minnesota, IS MODIFIED to specify operation on Channel 4+ in lieu of Channel 4, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorizing any change in License BLCT-2226 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules. require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rule, PROVIDED the transmission facilities comply in all respects with License BLCT-2226 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to WCCO Television, Inc., Station WCCO-TV, 50 South Ninth Street, Minneapolis, Minnesota 55402.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A television station may be required to operate with or without a channel offset. A station with a "plus" or "minus" offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television station reduces interference and makes possible the separation criteria set forth in our Rules.

[2] By Public Law 98-214, enacted December 8, 1983, 97 Stat. 1467, the phrase "show cause by public hearing, if requested, why such order of modification should not issue" was deleted from Section 316 of the Act. Public Law 98-214 also imposed upon protesting parties requesting a hearing a requirement identical to that of Section 309 of the Act. Specifically, a protesting party must establish the existence of a substantial and material question of fact in order to obtain a hearing under Section 316 of the Act.

[3] In paragraph 5 of the original *Notice of Rule Making and Order to Show* Cause, *supra*, we stated that the eventual permittee of the Crandon allotment would be required to reimburse Station WCCO-TV. This requirement is in accordance with existing Commission policy of requiring the benefiting party to reimburse the station incurring expenses necessary to accommodate a proposed facility.

[4] The costs of changing a channel offset would include a new crystal and retuning the transmitter. It is also possible that it would be necessary to recalibrate some meters and monitors at the television station. It is our experience that the total cost would not exceed 5,000.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1988; Released: November 22, 1988

By the Commission:

I. INTRODUCTION

1. On July 2, 1987, the National Exchange Carrier Association (NECA) requested a waiver of the former Section 67.621(a)(4) and the current Section 36.621(a)(4) of our rules[1] to permit it to allocate corporate operations expenses and taxes on the basis of gross investment rather than net investment in computing the level of the Universal Service Fund (USF) pursuant to Part 36, Subpart F, of this Commission's Rules.[2] The Common Carrier Bureau granted NECA's waiver request on a limited basis through December 31, 1988, to provide this Commission with the opportunity to determine whether we should issue a Notice of Proposed Rule Making regarding the use of gross investment in the allocation of corporate operations expenses and taxes for the purpose of calculating the level of USF support. [3]

2. We hereby seek comment concerning the allocation of certain costs in the computation of the USF. Specifically, we request comment on whether we should revise the current procedures for the allocation of corporate operations expenses[4] and taxes[5] in calculating the national and study area average loop costs which in turn are used to determine the high cost assistance provided under the USF.[6] These average loop costs are included in the formula that NECA must use to calculate the additional amount that local exchange carriers (LECs) with higher-than-average loop costs[7] allocate to the interstate jurisdiction.[8] The current rules require that, in computing average loop costs for the nation as well as for each study area, NECA must include a portion of corporate operations expenses and taxes allocated between loop and non-loop costs on the basis of net investment. We propose to amend the rules to require the allocation of corporate operations expenses on the basis of gross plant investment rather than net plant investment.[9] We also propose that NECA continue to allocate taxes based on net investment. We refer this issue to the Docket 80-286 Joint Board and request that it review the comments and prepare a recommendation for further action regarding these issues.

II. BACKGROUND

3. In 1980, we instituted CC Docket No. 80-286 for the purpose of re-examining the procedures for the allocation of local exchange costs between state and interstate jurisdictions.[10] The Docket 80-286 Joint Board recommended that we establish a high cost factor to be included in the procedures for the apportionment of these costs to provide assistance for customers of LECs with higher-than-average loop costs.[11] The Joint Board recommended that these carriers be required to allocate certain additional costs to the interstate jurisdiction. In the *Third Report and Order*,[12] we named this high cost factor the Universal Service Factor and decided that the costs allocated to the interstate jurisdiction through the application of this factor would be recovered through Carrier Common Line charges paid by interexchange carriers.[13] We believed this high cost factor would promote and preserve universal service by enabling high cost companies to establish local exchange rates that were lower than they would have been without this assistance.

4. In 1983, based on the recommendations of the Joint Board,[14] we adopted procedures for the development of the Universal Service Factor.[15] These procedures included an additional lump sum interstate allocation for LECs in study areas with unseparated non-traffic sensitive local loop costs in excess of 115 percent of the national average. This additional interstate allocation, which is known as the USF expense adjustment, is calculated pursuant to the Separations Manual provisions. This adjustment produces a smaller state revenue requirement for the affected LECs.

5. In 1984, based on the recommendations of the Joint Board,[16] we retargeted the high cost assistance measures to provide additional assistance to study areas with fewer than 50,000 lines and with particularly high costs.[17] In 1987, based on the recommendations of the Joint Board,[18] we adopted further provisions for high cost assistance.[19] In that decision, we retargeted the high cost assistance mechanism to increase assistance to small and medium-size LECs and decrease assistance to LECs serving over 200,000 access lines.

III. SUMMARY OF WAIVER PETITION AND COMMENTS

6. NECA stated in its petition that gross investment is more appropriate than net investment as a basis of allocation for corporate operations expenses and taxes because gross investment is consistent with this Commission's traditional jurisdictional allocation methodology, and because it produces greater benefits for smaller, high cost LECs. NECA argued that this Commission has generally used gross investment as a basis for expense allocations in the Separations Manual. NECA contended that gross investment is especially appropriate for allocating corporate operations expenses and taxes because these costs are incurred during the current period and should not be affected by depreciation reserves.[20] NECA also argued that the use of net investment as a basis for allocation will be disadvantageous to the smaller, high cost LECs and that the beneficiaries of a net investment allocation are generally the larger, high growth companies rather than the "truly" high cost companies. It also argued that the use of the gross investment allocation ratio does not increase the overall size of the USF.

7. All seven parties that filed comments supported NECA's petition.[21] Those comments generally contended that gross investment is an appropriate and rational basis for calculating loop costs for high cost assistance, that gross investment is the industry standard for allocating costs, and that the use of gross investment is consistent with this Commission's traditional jurisdictional separations methodologies. The parties claimed that a gross investment allocation produces greater benefits for smaller, high cost LECs and that a net investment allocation produces greater benefits for the larger, high cost LECs, particularly in high growth areas. The parties argued that, by incorporating relative levels of depreciation reserves into the allocation, net investment skews the allocation in favor of high growth areas instead of areas with "truly" high costs, thus undermining the goals the USF was designed to achieve. In reply comments, USTA stated that the burden of using the net investment ratio was not offset by any benefits.

IV. DISCUSSION

8. After reviewing NECA's waiver request and the comments filed in response, we believe the issue of the allocation of corporate operations expenses and taxes in computing the USF expense adjustment warrants further review. We tentatively conclude that gross investment is a more appropriate basis than net investment for the allocation of corporate operations expenses in the calculation of the loop costs necessary to compute the level of USF support for each study area. We propose, therefore, that corporate operations expenses be allocated on the basis of gross investment. For taxes, however, we tentatively conclude that net investment continues to be an appropriate basis for allocation.

9. Corporate operations expenses are generally related to the size of the LEC's operations. We believe gross investment is a better indicia of the size of the carrier's operations than net investment and, therefore, gross investment would be a better basis of allocation for these overhead expenses.[22] Because the calculation of net investment depends upon depreciation reserve levels, under the current net investment method, depreciation reserve levels affect the allocation of corporate operations expenses. These reserve levels are in turn affected by factors, such as equipment life and salvage estimates, which have little relationship to the relative size of the LECs' operations. On the other hand, the use of gross investment would allocate corporate operations expenses on the basis of the original cost of the investment, and thus, the allocation would be unaffected by the depreciation reserve levels. We, therefore, tentatively conclude that NECA should allocate corporate operations expenses on the basis of gross investment in calculating the level of USF support and we request that parties comment on this tentative conclusion. We also request that parties comment on NECA's assertion that the use of a net investment methodology is disadvantageous to smaller, high cost companies and advantageous to larger, high growth companies because net investment excludes depreciation reserves. Such a result would be inconsistent with the purposes of the USF, *i.e.*, to benefit high cost companies.

10. We also propose that taxes continue to be allocated based on net investment. Because income taxes, which represent the majority of taxes at issue here, are assessed on the basis of net income and because net income represents the rate of return on net investment, we tentatively conclude that the current net investment methodology for allocating these costs should be retained. We request that parties comment on this tentative conclusion.

11. Accordingly, we refer this issue to the Docket 80-286 Joint Board and request that it prepare a recommendation regarding these issues. We request that parties file comments on the separations procedures outlined in Appendix A which would implement our tentative conclusions. Parties may propose alternative approaches for the allocation of these expenses. Such parties should include specific proposed rule amendments to implement those approaches. We expect any alternative approaches to be as specific as possible and to be well-supported. We also request NECA to file in this docket the information, by study area, that each LEC filed with NECA on June 30, 1988, to enable us to determine the results any proposed rule change would have on the USF.

V. COMMENTS INVITED

12. Interested parties may file comments in response to this Notice on or before **January 12, 1989,** and reply comments on or before **January 27, 1989.** In accordance with Sections 1.415 and 1.419 of the Commission's Rules,[23] parties must serve an original and five copies on the Secretary of this Commission. Parties must also serve copies on the Joint Board members and staff listed in Appendix B and on the Commission's contractor for public records duplication, International Transcription Services, Inc., 2100 M Street N.W. Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies of the comments will be available for inspection in the Commission's Docket Reference Room, 1919 M Street N.W. Room 239, Washington, D.C. 20554.

VI. OTHER MATTERS

A. Regulatory Flexibility Act

13. We certify that the Regulatory Flexibility Act[24] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of the Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this Notice in the Federal Register. As part of our analysis of the proposal described in this Notice, however, we will consider the impact on small telephone companies, *i.e.*, those serving 50,000 or fewer lines.[25] The action proposed herein would have a beneficial economic impact on the majority of the small telephone companies because it would promote universal service by enabling the telephone companies and state regulators to establish local exchange service rates in high cost areas that are lower than they otherwise would be.

B. Paperwork Reduction Act

14. We have analyzed the proposal contained herein with respect to the Paperwork Reduction Act of 1980[26] and have tentatively concluded that it will not, if adopted, impose new or modified information collection requirements on the public. Therefore, implementation of the proposed requirements will not be subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act.

C. Ex Parte Contacts

15. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[27] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when this Commission: (1) releases a text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.[28] During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by this Commission or our staff for the clarification or addition of evidence or the resolution of issues in the proceeding.[29]

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding; or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[30] Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to this Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates.[31]

17. For Joint Board actions, special *ex parte* rules apply.[32] For those actions, all written materials that are not filed in accordance with a pleading cycle established by the Joint Board shall be accompanied by a Petition for Leave to File showing cause why the material should be considered by the Joint Board. The Joint Board will not consider any filing made outside the authorized pleading cycle and received by this Commission less than fifteen days[33] in advance of a Joint Board meeting at which it will consider the subject matter of that filing. Written *ex parte* presentations, as defined by our rules, need not be accompanied by a Petition for Leave to File and may be received at the discretion of the Joint Board member or staff personnel involved. No written *ex parte* presentations, however, shall be made during the fifteen day period immediately preceding a Joint Board meeting except in response to an inquiry initiated by a member of the Joint Board or its staff.

VII. AUTHORIZING PROVISIONS

18. This action is taken pursuant to Sections 4(i) and (j), 201-205, 218, 221(c), 303(r), 403, and 410 of the Communications Act, as amended.[34]

VIII. ORDERING CLAUSE

19. Accordingly, The Joint Board in CC Docket No. 80-286 shall review the comments, proposals, and data filed in response to this Notice and prepare a recommendation to this Commission on the issues raised herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 36 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. The authority citation for Part 36 continues to read:

Authority: 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

2. The title of Subpart F is proposed to be revised to read as follows:

Subpart F - Universal Service Fund Expense Allocation

3. Sec. 36.601 is proposed to be amended by revising paragraph (a) to read as follows:

Sec. 36.601 ***General***

(a) The Universal Service Fund Expense Allocation shall consist of an expense adjustment computed in accordance with this Subpart F. The expense adjustment will be added to interstate expenses and deducted from state expenses after expenses and taxes have been apportioned pursuant to Subpart D.

* * * * *

4. Sec. 36.621 is proposed to be amended by revising paragraph (a)(4) and by adding paragraph (a)(5) as follows:

Sec. 36.621 ***National and Study Area Average Loop Costs per Working Loop***

(a) * * *

(4) Corporate Operations Expense, and the benefits and rent portions of operating expenses as reported in Section 36.611(a)(5) attributable to investment in Category 1.3 Cable and Wire Facilities (C&WF), and Category 4.13 Central Office Equipment (COE). To calculate the amount of these expenses attributable to investment in Category 1.3 C&WF and Category 4.13 COE, multiply each of these expenses by the ratio of the unseparated gross plant investment in Category 1.3 C&WF and Cate-

gory 4.13 COE, as reported in Section 36.611(a)(1), to the unseparated gross telecommunications plant investment for the study area as reported in Section 36.611(a)(6).

(5) Operating Taxes reported in Section 36.611(a)(5) attributable to investment in Category 1.3 C&WF and Category 4.13 COE. To calculate the amount of these taxes attributable to investment in Category 1.3 C&WF and Category 4.13 COE, multiply each of these taxes by the ratio of the unseparated net plant investment in Category 1.3 C&WF and Category 4.13 COE as calculated in Section 36.621(a)(1) to the unseparated net investment for total telecommunications plant for the study area. The unseparated net investment for total telecommunications plant for the study area equals the unseparated gross telecommunications plant investment as reported in Section 36.611(a)(6) minus the unseparated accumulated depreciation and noncurrent deferred federal income taxes attributable to total telecommunications plant as reported in Section 36.611(a)(7).

APPENDIX B

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DOCKET NO. 80 - 286 FEDERAL - STATE JOINT BOARD STAFF

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FOOTNOTES

[1] Part 36 of our rules replaced Part 67 effective January 1, 1988.

[2] 47 C.F.R. Part 36, Subpart F.

[3] National Exchange Carrier Association, Inc., Petition for Waiver of Sections 67.621(a)(4) and 36.621(a)(4) of the Commission's Rules, 3 FCC Rcd 1023 (1988). In accordance with the discussion in that Order, we extend the waiver granted therein until the resolution of this proceeding. *See id.* at 1024.

[4] Corporate operations expenses include those expenses listed in Section 32.5999(h)(Table) of our rules. 47 C.F.R. §32.5999(h)(Table). Corporate operations expenses also include the benefits and rents portion of these accounts. *See* 47 C.F.R. §§32.5999(f)(2) and (3).

[5] Taxes include those taxes listed in Accounts 7200, 7210, 7220, 7230, 7240 and 7250. *See* 47 C.F.R. §§32.7220, 32.7210, 32.7220, 32.7230, 32.7240 and 32.7250.

[6] *See* 47 C.F.R. §36.621(a)(4).

[7] The loop costs include the costs associated with Category 1.3 Cable and Wire Facilities investment and Category 4.13 Central Office Equipment investment.

[8] 47 C.F.R. §36.631.

[9] The allocation process under consideration here is illustrated by the following example. Assume a LEC has corporate operations expenses of100 and taxes of50 and has the following gross and net investments:

	Gross Investment	Depreciation and Other Reserves	Net Investment
Loop plant	300	100	200
Non-loop plant	100	50	50
Total	400	150	250

If net investment is used as the basis of allocation, as our current rules require, 80 (*i.e.*, net investment for loop plant / total net investment x corporate operations expenses or200 /250 x 100) in corporate operations expenses and40 (*i.e.*, 200 /250 x50) in taxes would be allocated to loop costs. If, however, gross investment is used as the basis of allocation,75 (*i.e.*, gross investment in loop plant / total gross investment x corporate operations expenses or300 /400 x100) in corporate operations expenses and37.50 (*i.e.*,300 /400 x50) in taxes would be allocated to loop costs. We note, however, that a change in the allocation of loop costs resulting from a rule change such as that shown in this example, would not necessarily result in a one-for-one change in USF support levels. This is true because the level of USF support is determined by the relationship of the individual study area loop costs to the nationwide average loop costs.

[10] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 78 FCC 2d 837 (1980).

[11] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 47 Fed. Reg. 54,479 (December 3, 1982).

[12] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983).

[13] Revenues attributable to the Universal Service Factor are described as the Universal Service Fund. *Third Report and Order*, 93 FCC 2d at 282. We propose in this Notice to revise the rules to clarify that the applicable Part 36 procedures are used to derive the Universal Service Fund Expense Allocation. *See infra* Appendix A.

[14] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 48 Fed. Reg. 46,556 (October 13, 1983).

[15] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

[16] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48,325 (December 12, 1984).

[17] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 84-637, released December 28, 1984, 50 Fed. Reg. 939 (January 8, 1985).

[18] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2078 (1987).

[19] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987).

[20] Depreciation reserves (or accumulated depreciation) represents the portion of gross plant that has already been recovered through depreciation expense. *See* 47 C.F.R. §32.3100.

[21] We established a pleading cycle for comments in Public Notice, Pleading Cycle Established for NECA Petition for Waiver of Sections 67.621(a)(4) and 36.621(a)(4) of the Commission's Rules, released August 7, 1987. Comments were filed on August 28, 1987, and reply comments on September 11, 1987. The following parties filed comments or reply comments: United States Telephone Association (USTA), National Telephone Cooperative Association, Georgia Telephone Association and South Carolina Telephone Association, the Organization for the Protection and Advancement of Small Telephone Companies, Pacific Bell, Iowa Telephone Association, and Texas Statewide Telephone Cooperative, Inc.

[22] In certain cases, gross investment is a far superior basis of allocation than net investment. This can best be illustrated using an extreme example. Assume that corporate operations expenses are100 and assume the following factors:

	Loop Plant	Non-loop Plant	Total Plant
Gross investment	500	500	1000
Depreciation reserves	(500)	(250)	(750)
Net investment	0	250	250

Based on the above assumptions, a gross plant allocation would assign50 of corporate operations expenses to loop costs and50 to non-loop costs. A net investment allocation, on the other hand, would assign no corporate operations expenses to loop costs; the full100 of corporate operations expenses would be assigned to non-loop costs. This extreme example shows the distortion that may result when net investment is used to allocate these expenses.

[23] 47 C.F.R. §§1.415 and 1.419.

[24] 5 U.S.C. §601.

[25] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of the Act to apply the formal procedures set forth therein. This Commission is nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent

with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[26] 44 U.S.C. §501.

[27] *See generally* 47 C.F.R. §1.1206(a).

[28] 47 C.F.R. §1.1202(f).

[29] 47 C.F.R. §1.1203.

[30] 47 C.F.R. §1.1202(b).

[31] 47 C.F.R. §1.1206.

[32] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 89 FCC 2d 36 (1982).

[33] In calculating this fifteen day period, neither the day on which the material is filed nor the day on which the Joint Board meeting is scheduled shall be counted.

[34] 47 U.S.C. §§154(i) and (j), 201-205, 218, 221(c), 303(r), 403, and 410.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAM A. DODD, Jr. File No. L-2252
8513 Sixtieth Avenue
College Park, Maryland 20740

Licensee of SMR station KNGR-704
Washington, D.C.

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1988; Released: November 23, 1988

By the Commission:

I. SUMMARY

1. The Commission has for consideration an application for review filed on October 30, 1987, by William A. Dodd, Jr., licensee of SMR trunked station KNGR-704 in Washington, D.C.[1] The application asks the Commission to set aside a Private Radio Bureau decision reinstating twelve SMR channels in the Washington area to Motorola, Inc. For the reasons given below, we deny the instant application for review.

II. BACKGROUND

2. The dispute in this matter surrounds 800 MHz trunked SMR station WQP-231, currently licensed to Motorola in the Washington, D.C. area. Station WQP-231 was originally licensed to Greater Washington Mobile Radio for a five year term expiring December 18, 1985. In 1981 and 1982 the facilities were modified and the Commission issued new license documents. The latter modification was granted for a five year term expiring February 11, 1987. The revised license issued at that time included a "special condition"[2] advising Greater Washington that, although its license term now expired in February, 1987, the period for loading the station, as required by Section 90.366(e) [3] of the Commission's Rules, was not extended beyond December 1985.

3. In August 1983, the Commission granted an application to assign the license for station WQP-231 to TelAir Network. The license issued to TelAir again stated that it expired in February 1987, but did *not* include the special condition advising the assignee that the loading requirements of Section 90.366 must be satisfied by the end of the initial license term. In 1983 and 1984 the facilities were modified and the Commission again issued new license documents. These licenses both specified the February 1987 expiration date and included the special condition. Then, in March 1985, the Commission granted an application to assign the license to Motorola, Inc. The license issued to Motorola specified a March 1990 expiration date. The license, however, did *not* include the special condition.

4. By letter dated March 18, 1986, the Bureau informed Motorola that twelve of its twenty channels on station WQP-231 had been taken back for reassignment because Motorola failed to load the station to 70 percent within five years as required by Section 90.366(e) of the Commission's Rules. The loading records on file with the Commission showed WQP-231 to have only 711 mobile and control stations. The Bureau calculated the loading deadline based on the original December 18, 1980 grant date for station WQP-231.

5. Motorola petitioned for reinstatement of the channels.[4] Motorola argued that it erroneously believed the loading deadline for the station was February 11, 1987, as this was the expiration date on the superceded license.[5] This mistake occurred, according to Motorola, because the Commission's staff inadvertently omitted the special condition on the license documents and had granted Greater Washington a new five year term in 1982.

6. The Bureau granted Motorola's petition on July 31, 1986 and reinstated its license to full twenty channel authority.[6] The Bureau recognized that the confusion in this and similar cases was caused in large part by processing aberrations which affected a small group of SMR licensees whose licenses inadvertently failed to contain the special condition stating that the mobile loading benchmark was not extended. Motorola did not rely on *its* license date. It relied on the expiration date of its assignor's license for station WQP-231. Thus, as it had done in similar cases, where a licensee mistakenly relied on the expiration date appearing on its new license, the Bureau determined that the effective loading date was the later expiration date.[7]

7. On November 10, 1986, Dodd filed an "appeal" of the Bureau's July, 1986 decision. Dodd was third on the Washington, D.C. area waiting list for additional 800 MHz frequencies at the time he filed this petition.[8] Dodd argued that the Bureau impermissibly reinstated Motorola's license to full twenty channel authority. The Bureau denied this appeal by letter dated March 18, 1987.[9] The Bureau first explained that Dodd's appeal was untimely because it was filed more than thirty days after the date of the July 31, 1986, decision.[10] The Bureau also addressed the merits of Dodd's argument explaining that, as it has done in several similar cases, it granted Motorola's petition in light of the confusing transactional and licensing history of station WQP-231.

8. Dodd filed a petition for reconsideration addressing both the procedural issue and the merits on April 20, 1987. Dodd contended that he did not have to file his appeal within thirty days of the Bureau's July 31, 1986, action because he did not learn of it until "some time in October" 1986.[11] Dodd thus contended that the thirty day filing period, pursuant to Section 1.106(f) of the Commission's Rules, did not commence until he actually became aware of the decision in October 1986.

9. The Bureau reviewed the merits of Dodd's arguments and found no basis for overturning its earlier action. Because the Bureau twice reviewed the record and Dodd's substantive arguments, it dismissed his timeliness/notice issue as moot and denied the petition on September 21, 1987.[12] Dodd filed the instant application for review on October 30, 1987.[13]

III. DODD'S APPLICATION FOR REVIEW

10. Dodd argues first that the Bureau has no discretion to waive or modify the automatic cancellation provision of Section 90.366(e). Dodd states that Section 90.366(e) has a strong policy basis, that the policy of the Commission is to enforce the rule strictly,[14] and that Motorola had only a contingent right to the channels that did not vest because the channels were not timely loaded. Dodd asserts that Motorola's license was issued subject to the condition that the twenty channels be loaded to seventy percent within five years of the original grant and that the Bureau cannot waive or modify this condition.

11. Dodd alternatively asserts that if the Bureau's action constitutes a waiver of Section 90.366(e), a waiver has not been justified. Dodd maintains that Motorola was either aware of the December 18, 1985, loading deadline or was on notice to make reasonable inquiry to resolve any confusion as to the actual loading date. Dodd asserts, therefore, that even if the Bureau's corrective remedy is permissible and equitable in some cases, it is not proper here because Motorola knew or should have known the actual loading deadline.[15] Finally, Dodd asserts that the Bureau's actions were arbitrary and capricious and lacked even minimal procedural safeguards because he was denied a comparative hearing. Dodd asserts that because he is a Washington area waiting list applicant who could have received channels recovered from Motorola, the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC* [16] requires a comparative hearing. Dodd argues that the Bureau instead conducted its review in such a way to impermissibly immunize Motorola from competitive challenge.

IV. DISCUSSION

12. Section 90.366(b)[17] provides, in essence, that the specified loading benchmark of seventy mobiles per channel must be achieved within five years *from the initial license grant*. Section 90.366(e), however, states that SMR systems in areas where all frequencies are assigned must be loaded to 70 percent (1400 mobiles for a twenty channel system) *at the end of a license term*. The Commission adopted these rules, in part, to ensure that licensees would not assign licenses for unloaded stations near the end of a license term to defeat the Commission's loading requirements. During the administration of these rules, however, some confusion developed when licensees received revised license documents with expiration dates later than the initial termination date. Specifically, confusion arose as to whether the loading benchmark occurred at the end of the initial license grant, as suggested by Rule 90.366(b), or at the end of the revised license term, as suggested by Rule 90.366(e).

13. The most serious confusion existed when a license was assigned and the assignee received a new five year license term.[18] To eliminate this confusion, the Bureau began placing a special condition on all SMR licenses expiring later than five years from the original license grant. As previously noted, this condition was intended to advise SMR licensees that the period for loading the system was the expiration of the initial license grant. In a series of license grants, however, due to processing errors, the special condition was inadvertently not placed on the licenses. The Bureau concluded, in those few unusual cases, that the later dates should be applicable to these licensees because of the confusion created by our license documents and the Rules.[19]

14. Here, the Bureau properly exercised its discretion to grant Motorola the same relief given to other similarly situated licensees that were confused by inadvertent irregularities in our licensing documents and the Rules.[20] Motorola states that it knew that the loading deadline did not expire at the end of the 1990 license term appearing on its first license. It concluded that the five year loading deadline expired at the end of its assignor's license term in February 1987 because it was unaware that the Commission staff had, when it granted Greater Washington Mobile Radio's 1982 modification request, extended the license expiration date from 1985 to 1987.[21] There is no evidence in the record in this case that Motorola had actual notice of what should have been the five year loading date for station WQP-231.

15. Dodd's contention that the Bureau's action with respect to station WQP-231 violates Section 90.366(e) is incorrect. As noted above, the rule states that the system must be loaded at the end of the license term. The Bureau concluded after considering Motorola's petition for reconsideration that the applicable "end of the license term" was February 11, 1987. This was the expiration date appearing on the assignor's license.

16. Moreover, the Bureau properly applied the requirements of Section 90.366. Licensees have thirty days under Section 1.106(f) to petition for reconsideration of channel recoveries. Only if the licensee's petition for reconsideration is denied, or the thirty day period lapses without the licensee filing a petition, are the recovered channels ultimately made available for assignment to applicants on the area waiting list. Motorola filed a timely petition for reconsideration, which the Bureau granted. As a result, the channels were never available for reassignment.[22]

17. Finally, Dodd has no right to a comparative hearing. As waiting list applicant, Dodd is not a *bona fide* applicant for the twelve channels at issue here. Unless we had decided to reverse the Bureau's decision to reinstate Motorola's license, the channels did not become available for reassignment. Dodd, therefore, has no right to a comparative hearing under *Ashbacker*. He holds only the right to have his wait list application processed if channels recovered and made available in the Washington area are not all reassigned to applicants ahead of him in the queue. In the instant case, no channels were made available to any applicant.[23]

V. CONCLUSION

18. Accordingly, IT IS ORDERED that the Application for Review filed by William A. Dodd, Jr., File No. L-2252, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Also before the Commission is Motorola's Opposition filed on December 2, 1987, and Dodd's Reply filed on December 14, 1987.

[2] The "special condition" read as follows: "This grant does not extend the time for loading. That period runs from the original grant date."

[3] Section 90.366(e), 47 C.F.R. § 90.366(e), provides that if at the end of a license term, a trunked system is not loaded to 70 percent (1400 mobiles for a twenty channel system) and all frequencies are assigned in the system's geographic area, authorization for channels not loaded to 100 mobiles cancels automatically.

[4] In support of its petition, Motorola submitted a list of cases in which the Bureau extended loading dates for licensees adversely affected by application processing aberrations. Motorola Pleading filed June 23, 1986. There is no merit to Dodd's assertion that Motorola violated the Commission's *ex parte* rules by filing this supplement. *See* Application for Review at 4. The *ex parte* rules prohibit certain presentations which are not served on all parties in multi-party proceedings. There were no other parties to the proceeding at the time Motorola filed this supplement. *See* 47 C.F.R. § 1.1201 *et seq.*

[5] We note that by February, 1987 Motorola had loaded the system with 1,786 mobiles.

[6] Letter of July 31, 1986, from the Chief of the Private Radio Bureau to Motorola, Inc.

[7] In the following cases the Bureau determined that the effective loading date occurred after expiration of the original five year license terms: Communications Enterprises, station WZF975; Greater Media, Inc., station WZS655; Communications Systems, station WZZ543; Racom Services Corp, station KNCZ546; Reynolds of San Bernardino, station KRU777; Frontier Radio, Inc, station KSD529; Mobile Comms., Inc., station WZE734; Amcom Towers, station WRG676. In each of these cases, the special condition was inadvertently omitted from a revised license document which showed an expiration date later than five years from the original license grant.

[8] If the twelve channels recovered from Motorola were made available for reassignment, Dodd could possibly receive some of the channels if his application were acceptable and the channels were ones Dodd could use.

[9] Letter of March 18, 1987, from the Chief of the Land Mobile and Microwave Division, Private Radio Bureau, to Douglas R. Thomas, Esquire.

[10] Rule 1.106(f), 47 C.F.R. § 1.106(f), provides that petitions for reconsideration of actions taken pursuant to delegated authority must be filed within 30 days from the date of the public notice of the final Commission action, as that date is defined in Rule 1.4(b), 47 C.F.R. § 1.4(b).

[11] *See* 47 C.F.R. § 1.4(b). The Bureau served a copy of its July, 1986 decision on the only party to the proceeding and did not provide public notice. Dodd states that he first learned of the decision through a third party contact in the industry sometime in October, 1986. *See* Application for Review at 3.

[12] Letter of September 21, 1987, from the Chief of the Land Mobile and Microwave Division, Private Radio Bureau, to Arthur B. Pearlstein, Esquire.

[13] The Bureau granted a request for a ten day extension of time for Dodd's filing of his Application for Review.

[14] *See* Application for Review at 7-8.

[15] Dodd states that a Private Radio Bureau staff memorandum indicates that Motorola "almost certainly knew the loading date." *See* Application for Review at 11-13. Dodd is incorrect. The staff memorandum stated that while Motorola probably knew the loading date could have been interpreted as the 1985 date, Motorola nonetheless was correct in relying on the 1987 date. The staff based this conclusion on the confusing licensing history in which licenses were inadvertently issued without the special condition. The staff recommended that the Bureau consistently apply the Commission's policy of equitable loading date interpretations as was done in the several similar cases. *See supra*, fn. 7. Staff memorandums, in any event, in no way represent conclusions of the Bureau. *See* P&R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984).

[16] 326 U.S. 327 (1945).

[17] 47 C.F.R. § 90.366(b). The rule states that each applicant for a trunked system must certify that a minimum of 70 percent of the mobile units specified in the application will be placed in operation within five years from grant of the initial license.

[18] The Licensing Division routinely grants new license terms whenever approving modifications, assignments or transfers for stations operating below 800 MHz. This practice reduces the paperwork burden on licensees and the Commission. The Licensing Division extended this practice in 1982 to similar applications for 800 MHz SMR stations. Within a short period, however, the staff recognized that this practice created confusion as to the loading date for 800 MHz stations and stopped granting mid-term license renewals for these stations. The Licensing Division now includes the special condition on 800 MHz license documents when needed to minimize confusion.

[19] *See* Satellite Broadcasting Co. v. FCC, 824 F.2d 1 (D.C. Cir. 1987), Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664 (D.C. Cir. 1987), Metro-Act of Rochester, Inc. v. FCC, 670 F.2d 202 (D.C. Cir. 1981 as amended May 18, 1982).

[20] *See* Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). *See* also *supra*, fn. 7.

[21] *See supra*, fn. 18.

[22] In any case, Dodd's contention that he has a right to any channels recovered from Motorola is also incorrect. Recovered channels are offered, in order, to those on the wait list. An offeree, however, may or may not be able to use the specific channels available based on technical considerations, especially if it hopes to add the channels to an existing SMR system.

[23] *See supra*, ¶ 16.

Before the
Federal Communications Commission
Washington, D.C. 20554

FOIA Control No. 88-8

In the Matter of

WILLIAM BRANSFORD

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1988; Released: November 23, 1988

By the Commission:

1. Before the Commission for its consideration is an Application for Review of the Mass Media Bureau's initial decision to deny the above-referenced request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. On behalf of Glenn Wolfe and Susan Simcox, William Bransford sought all Commission records and information relevant or pertaining to "the decision to conduct an investigation or examination of the EEO Branch . . . ." The Bureau located six responsive documents but concluded that they were exempt from the FOIA's disclosure mandate. Mr. Bransford's Application for Review challenges the Bureau's determination. For the reasons set forth below, we affirm the Bureau's decision.

2. In its decision, the Bureau initially indicated that these documents were not subject to the Privacy Act because they were not part of a system of records maintained by the Commission.[1] Thus, that Act's disclosure provisions, 5 U.S.C. § 552a(d), were inapplicable. Therefore, the only relevant inquiry concerned whether the documents were available under the FOIA. Upon reviewing the documents, the Bureau determined that all six were exempt from disclosure pursuant to either FOIA Exemption 2 or FOIA Exemption 7.

3. FOIA Exemption 2 exempts records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 47 U.S.C. § 0.457(b). The Bureau found that this exemption was applicable to documents (1), (3), (4), and (5) because they related to unsubstantiated complaints and allegations of mismanagement which the complainants had raised. The Bureau was concerned that disclosure of these documents could interfere with the development of the fact-gathering administrative inquiry then in progress and possibly result in the circumvention of agency regulations or statutes. The Bureau cited *Frank v. Department of Justice*, 480 F. Supp. 596 (D.D.C. 1979) and, more generally, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981).[2]

4. The Bureau also asserted that FOIA Exemption 7(D) shielded documents (1), (3), (4), and (6) as well as portions of document (2) from the FOIA's disclosure mandate. That Exemption exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (D) could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis. . . ." In particular, the Bureau was concerned that release of these documents would result in the identification of the complainants, either by name or by the information they furnished. As support for this action, the Bureau referred to *T. V. Tower, Inc. v. Marshall*, 444 F. Supp. 1233, 1236 (D.D.C. 1978).

5. Finally, the Bureau held that documents (2), (4), and (6) are not agency records because they were merely handwritten, personal notations prepared for the author's own use and convenience. *See Porter County Chapter of Izaak Walton League of America, Inc. v. U. S. Atomic Energy Commission*, 380 F. Supp. 630 (N.D. Ind. 1974).

6. Bransford's Application for Review initially challenges the Bureau's finding that Exemption 2 can protect some of these documents. He notes that the Commission's FOIA rules require that Exemption 2 materials must relate "solely" to internal management matters or the negotiation of contracts, while the subject documents do not appear even remotely to be encompassed within such categories. Next, Bransford disputes any attempt to apply FOIA Exemption 7 to these documents. He maintains that FOIA Exemption 7 can only apply when an actual investigation is in progress or when information is being developed for law enforcement purposes. Such circumstances, he argues, do not exist in this instance because the Commission has repeatedly assured him that the various Commission inquiries concerning this matter did not rise to the level of an investigation. Further, he notes that the Commission's own regulations governing such investigations, 47 C.F.R. § 19.735-107(b), were not followed. Accordingly, he concludes that neither Exemption 2 nor 7(D) could be applicable.

DISCUSSION

7. Before addressing Bransford's contentions, we wish to consider several points in the Bureau's decision that he has not chosen to challenge. In doing so, we hope to narrow the scope of the dispute. First, while Bransford's Application for Review suggests that he continues to consider the Privacy Act applicable to the subject documents, he does not specifically dispute the Bureau's conclusion that the Privacy Act does not apply to these documents. We concur in the Bureau's holding for the reasons contained in its decision. The subject documents were collected from many different sources and were not, as the Privacy Act requires, part of any system of records maintained by the Commission. Second, Bransford has not challenged the Bureau's finding that because they are only personal handwritten notes, documents (2), (4), and (6) are not agency records. We also affirm this aspect of the Bureau's decision. *See Porter County Chapter of Izaak Walton League of America, Inc. v. U. S. Atomic Energy Commission*, 380 F. Supp. 630, 633 (N.D. Ind. 1974); *Wolfe v. Dept. of Health and Human Services*, 539 F. Supp. 276, 277 (D.D.C. 1982), *aff'd*, 711 F.2d 1077 (D.C. Cir. 1983). *See* also *Bureau of National Affairs v. Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

8. With respect to the remaining records, documents (1), (3), and (5), we concur with the Bureau that these may be withheld pursuant to FOIA Exemption 2. Bransford con-

tends that these documents cannot be construed to be encompassed within Exemption as that Exemption is set forth in our rules. We disagree. The wording of Exemption 2 in our rules, 47 C.F.R. § 0.457(b), parallels the wording of Exemption 2 in the FOIA. In *Frank v. Department of Justice*, 480 F. Supp. at 597-98, the United States District Court for the District of Columbia held that the Department could withhold, pursuant to FOIA Exemption 2, documents which pertained "to the special agents' complaints of mismanagement in such areas as employees' leave, duty assignments and overtime," because they would not generally be of interest to the public. Bransford has not challenged the applicability of this case. Therefore, because the allegations under investigation in this proceeding were largely of the same nature or were so unsupported as to be of no interest to the public, we consider this decision dispositive. *See also NTEU v. U. S. Customs Service*, 802 F.2d 525, 531 & n. 21 (D.C. Cir. 1986).

9. Further, we agree with the Bureau's holding that documents (1) and (3) could have been withheld pursuant to FOIA Exemption 7(D). Because the names of some informants are also listed at the end of document (5), we also find that Exemption 7(D) is applicable to that portion of document (5). Bransford contends that because no formal investigation was initiated there is no basis for asserting any Exemption 7 claims. We find, however, that this demands too much and advances form over substance. Congress recently amended Exemption 7 deleting the requirement that records need to be investigatory before they could be protected. *See* 5 U.S.C. § 552(b)(7), as amended by Pub. Law. No. 99-570, § 1802 (1986). This change had the effect of broadening the scope of Exemption 7. Thus, even documents prepared in an informal, preliminary inquiry environment may be protected so long as the information or record relates to "law enforcement purposes." An inquiry into whether specific federal employees are performing their jobs properly and within the law involves law enforcement activity. *See, e.g., Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984); *Rural Housing Alliance v. U.S. Dept. of Agriculture*, 498 F.2d 73, 81-82 (D.C. Cir. 1974). Accordingly, FOIA Exemption 7(D) is available and may be asserted in order for the agency to protect the names and any other identifying information submitted by the confidential informants.

10. Finally, while we have found that documents (2), (4), and (6) are not agency records subject to the FOIA, we note that if they were to be found to be agency records, we would consider Exemption 2 applicable to document (4) and Exemption 7(D) applicable to documents (4) and (6) and to portions of document (2). The basis for this determination would be the same as that set forth for the other documents discussed above.

11. Accordingly, IT IS ORDERED that the Application for Review filed by Mr. William Bransford is denied. Mr. Bransford may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Privacy Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

[2] The Bureau had also contended that FOIA Exemption 7(A), which encompasses "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . .", justified withholding these documents. However, as the fact gathering inquiry has since been terminated, Exemption 7(A) is no longer available. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST — 7320-04/L-2244

Request for Declaratory Ruling

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 10, 1988; Released: November 23, 1988

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. In an order released August 19, 1987, we denied the request of General Telephone Company of the Southwest (General) for declaratory ruling that the microwave service planned by Invescom, Inc. (Invescom) would constitute common carriage.[1] We concluded that Invescom's proposed service, which was licensed under Section 94.17 of the Commission's Rules, 47 C.F.R. § 94.17, was a private carrier service.[2]

2. General has filed a petition for reconsideration of the *Invescom Decision*. [3] It argues that we failed to consider certain significant issues in the *Invescom Decision* and that a proper resolution of these issues would indicate that Invescom is a common carrier. We disagree and, for the reasons discussed below, deny General's petition for reconsideration.

II. BACKGROUND

3. Invescom operates an intrastate, for-profit microwave system between Denton, Texas and Dallas, Texas. Users of the system are interconnected to the Denton station by dedicated wire lines leased from General. They send voice or data communications over the microwave channels to the Dallas station where they are then returned to the public switched telephone network (PSTN). Users of the system have a local Dallas telephone number so that communications originating in Dallas go through a Southwestern Bell or General central office to the Dallas station. The communications are transmitted to the Denton station and then through a private base exchange (PBX) switch to the subscriber.

4. In its Request for Declaratory Ruling, General argued that the Invescom system was a common carrier under the criteria established in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*), and relied on by the Commission in its *First Report and Order* in PR Docket 83-426, 50 Fed. Reg. 13338 (April 4, 1985), which authorized the offering of private microwave service by entrepreneurs. In *NARUC I*, the court held that a common carrier is either required to hold out its service to all people indifferently or in fact chooses to do so.[4] A private carrier, on the other hand, does not undertake to serve all persons indifferently and, therefore, has no power to influence the price or availability of communications services. A private carrier enters into individually negotiated medium-to-long-term contracts with a relatively stable customer base having compatible service needs with that of the carrier and its other customers.[5] Invescom replied that it met all of the *NARUC I* tests for private carriage and that its operations constituted a proper use of private microwave systems. The Bureau concluded, based on the information submitted by the parties and under the standards established in *NARUC I* and the *First Report and Order*, that Invescom's proposed operation was consistent with the Commission's rules for private for-profit microwave service.[6] Accordingly we denied General's request that Invescom be declared a common carrier.

III. THE PLEADINGS

5. On reconsideration, General states that we failed to resolve significant issues that it raised in its Request for Declaratory Ruling.[7] For example, General asserts that we stated that Invescom's system was not yet in operation when, in fact, the system had begun operating. General also asserts that we did not resolve the question of how Invescom customers receiving residential telephone service from General could qualify as business eligibles. In addition, General contends that we reached no conclusion as to compatibility among users of Invescom's system. General also contends that its review of user contracts submitted to us by Invescom indicates that there is no support for our conclusion that the contracts were individually negotiated. Finally, General argues that we determined in a case involving Maine Microwave Association (MMA) that MMA's system was "similar" to Invescom's, even though the MMA system was not interconnected with the public switched telephone network (PSTN), and MMA characterized its offering as a substitute for private line service from a common carrier.[8] General contends that Invescom is not "similar" to MMA under these circumstances and that we should reconsider our conclusion that Invescom is a private carrier.

6. Invescom filed an opposition in which it maintains that our *Invescom Decision* accurately depicts relevant facts and correctly applies applicable case law to reach a proper conclusion. It states that General presents no facts or arguments that were not previously before us and, therefore, reconsideration is not warranted.[9] In reply to Invescom's opposition, General reiterates previous arguments, emphasizing particularly its contentions concerning the MMA case and the nature of Invescom's dealings with its subscribers.[10]

IV. DISCUSSION

7. We find General's assertion that we erred because we failed to mention that Invescom had begun operation to be of no significance. The initial pleadings in this matter were filed before Invescom placed its system in operation. We observed that Invescom was soliciting business eligibles, that its potential customers appeared to be eligibles under the Commission's rules, that the contracts were indicative of private carriage, and that General had failed to demonstrate non-compliance with the Commis-

sion's *First Report and Order, supra*, or the standards established by the Court in *NARUC I*.[11] Thus, our decision was based upon the characteristics of Invescom's proposed operation. In addition, we specifically noted that we would revisit the question of Invescom's regulatory status should the carrier's actual operation fail to comply with our private carrier rules and policies.[12] Absent evidence that Invescom has failed to comply, we see no reason to revisit this issue.

8. In a further attempt to establish Invescom's operations as common carriage, General asserts that our *Invescom Decision* failed to resolve the question of customer eligibility. General initially asserted that six unidentified Invescom customers also received residential telephone service from General.[13] It argued that this would make Invescom a common carrier because Invescom was not restricting its offering of service to Part 94 eligibles. Part 94 eligibles may, however, also subscribe to telephone service from General. This assertion, even if proven, does not demonstrate that Invescom is serving the public at large or that it is holding itself out to carry for all people indifferently.[14]

9. General's further assertion that the *Invescom Decision* failed to resolve adequately the issue of compatibility among Invescom's customers is equally unavailing. The *First Report and Order, supra*, indicated that "private microwave carriers will have a very strong incentive to select customers whose operations will be compatible with the communications of other users on the system." *Id.* at para. 53. We have been presented with no evidence indicating that the users on the Invescom system are, in fact, incompatible. Thus, there is no serious challenge to Invescom's private carrier status in this unsupported allegation.

10. Nor do we agree with General's assertion that Invescom's contracts are deficient because many of them contain the same hook-up fee or monthly user charge. These facts alone do not indicate that the contracts were not individually negotiated. The use of a form contract, or similarity of terms in some contracts, does not of itself indicate an absence of individual negotiation. Simply put, given the overwhelming use of form contracts in modern business, we cannot conclude that because most of the contracts are similar, Invescom is a common carrier.

11. Finally, General's attempt to distinguish Invescom's system from that proposed by MMA is unpersuasive. In finding that MMA's proposed offering would constitute private carriage, we specifically cited as "similar" to Invescom's service the fact that MMA intended to provide individualized service to a stable clientele of Part 94 eligibles. We see no reason why our decision regarding MMA requires a different result here.[15]

V. CONCLUSION

12. General has furnished no new evidence demonstrating either that Invescom is operating as a common carrier or that it has failed to comply with our private carrier rules and policies. Rather, General has essentially made the same arguments it tendered in its original request for a declaratory ruling. We conclude that our *Invescom Decision* correctly resolved those arguments.

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by General Telephone Company of the Southwest IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] General Telephone of the Southwest, No. 7320-04/L-2244, released August 19, 1987 (*Invescom Decision*).

[2] 47 C.F.R. § 94.17(a) provides that "Licensees of radio stations authorized under this part may share the use of their facilities on a non-profit basis or may offer service on a for-profit private carrier basis . . . ."

[3] General is a communications common carrier certificated to provide telephone service in Denton and other communities surrounding the Dallas-Fort Worth metropolitan area. Among its offerings is foreign exchange service (FX). FX allows a subscriber in Denton to obtain a local telephone number in Dallas and to receive telephone calls in Denton from Dallas without incurring toll charges. General offers this service to both business and residential customers in Denton.

[4] 525 F.2d at 641 (footnote omitted).

[5] *Id.* at 641-643.

[6] *Invescom Decision* at para. 12.

[7] Petition for reconsideration at 2-3.

[8] *See* Letter to Todd J. Parriott, Esquire, from Richard J. Shiben, Chief, Land Mobile and Microwave Division, September 23, 1987.

[9] Opposition at 1-3.

[10] Reply at 2-4.

[11] *Invescom Decision* at para. 12.

[12] *Invescom Decision* at para 14.

[13] In a February 26, 1987, supplement to its petition for declaratory ruling, General identified DuBois Chemical as another such customer.

[14] *See, e.g.* Paul Kelly d/b/a American Teltronix, FCC 88-282, released September 7, 1988, in which the Commission concluded that a private land mobile service licensee's offering of service to ineligibles, either inadvertently or intentionally, does not *ipso facto* transform its service into common carriage. We recognize that the tests of private carriage are different in the private land mobile service and the private operational-fixed microwave services. Nevertheless, in either case, occasional errors by a private carrier in offering service to ineligibles does not of itself transform its operations into a common carrier service.

[15] Moreover, the fact that Invescom's for-profit microwave system is interconnected with the public switched telephone network is not, under the standards of NARUC I, a relevant consideration in assessing its status as a private carrier. This is in contrast to the private land mobile service where interconnection with the public switched telephone network resulting in resale of telephone service for a profit is the determinant of common carriage. *See* Sections 331(c)(1) and 331(c)(2) of the Act, 47 U.S.C. 332(c)(1) and 332(c)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 23, 1988

IMPLEMENTATION OF THE 1987 WARC FOR MOBILE SERVICES

The World Administrative Radio Conference for the Mobile Services (Conference), held from September 14 to October 17, 1987, was broad in scope. It considered over 135 agenda items covering two-thirds of the Radio Regulations exclusively reserved to the mobile services. The Conference revised many parts of the Table of Frequency Allocations, as well as regulations concerning the mobile services, mobile satellite services (MSS), radionavigation, and radiodetermination satellite services (RDSS). The revisions included substantial changes to the high frequency (HF) maritime mobile bands that incorporate the additional spectrum allocated at the 1979 World Administrative Radio Conference (WARC), changes necessary to implement the Global Maritime Distress and Safety System (GMDSS). The Conference also provided for aeronautical public correspondence (public telephone) with aircraft.

Because of the magnitude of the revisions to the Radio Regulations, several rule making proceedings are planned to incorporate the changes into the Commission's Rules. The Conference provided that the revisions enter into force in two stages. To provide the maritime service with adequate transition time, those changes pertaining to the HF maritime mobile bands will not become effective until July 1, 1991. Similarly, the provisions necessary to accommodate the GMDSS, which will not be implemented before 1992, will also become effective on July 1, 1991. All other changes enter into force on October 3, 1989. Thus, three rule making proceedings are anticipated: (1) a General Docket containing those provisions that enter into force in 1989; (2) a second Docket incorporating the necessary HF revisions and those changes to the Table of Allocations that become effective in 1991; and (3) a final Docket implementing the GMDSS in the Maritime Service rules. The estimated schedule for the rule making proceedings is:

1. General Docket containing those provisions that enter into force on October 3, 1989.	NPRM R&O	April, 1989 October, 1989
2. Docket to revise the HF maritime mobile bands and associated changes effective on July 1, 1991.	NPRM 1st R&O 2nd R&O	January, 1990 April, 1990 August, 1991
3. Docket to incorporate NPRM the GMDSS provisions of Chapter [N IX] that enters in force on July 1, 1991.	R&O	October, 1991 July, 1991

1. GENERAL DOCKET

(Changes effective October 3, 1989)

Terms and Definitions: Add definitions to Section 2.1 for aeronautical (R) and (OR) services -- route and off route, respectively -- and aeronautical mobile satellite (R) and (OR) services, land earth station, base earth station, and land mobile earth station.

Frequency Allocations: Partially revise Section 2.106, the Table of Frequency Allocations, for various bands including the adoption of some of the international notes and changes to US notes. Changes to the U.S. Table of Allocations are being coordinated with the National Telecommunications and Information Administration (NTIA).

Mobile Satellite Service (MSS): By reallocating spectrum in the 1530-1559 and 1626.5-1660.5 MHz bands (L-band spectrum) to be shared both primarily and secondarily among the land, aeronautical, and maritime mobile satellite services, the U.S. was partially successful in establishing spectrum for a more general mobile satellite service (land, aeronautical, and maritime). However, the Conference did not allocate the spectrum to a generic MSS service as proposed and the allocation for shared service was less than sought. Because the mobile satellite service was unduly restricted, the U.S. took a formal reservation to use the L-band spectrum in the way most appropriate to satisfy its particular MSS requirements while recognizing the priority of AMSS(R) and maritime safety communications. Thereby, sufficient flexibility was maintained to enable the Commission to decide whether to continue the current domestic L-band allocation which is pending further reconsideration in Gen. Docket No. 84-1234.

Radiodetermination Satellite Service (RDSS): Sufficient spectrum was obtained to permit RDSS to begin operating initially in North America, with possibilities for an orderly global expansion, while ensuring an international status for RDSS in the Radio Regulations. After extensive debate and informal coordination, the allocations that finally emerged were the same as those specified in the U.S. domestic table at 1610-1626.5 and 2483.5-2500 MHz. The RDSS feeder links adopted (5150-5216 MHz), however, will have to be reflected in the Commission's Rules in place of the current U.S. band (5117-5183 MHz).

Aeronautical Public Correspondence: The Conference allocated 2 MHz (1593-1594 MHz and 1625.5-1626.5 MHz, secondarily in the U.S.) for terrestrial public correspondence with aircraft as an initial allocation for pre-operational and experimental purposes. The Commission has indicated that interest in aeronautical public correspondence could be met through the mobile satellite service or by the proposed U.S. allocation at 900 MHz (Gen. Docket No. 88-96). No change to the Commission's Rules for this type of communication is anticipated via this proceeding.

Other Matters: The technical requirements for VHF maritime equipment were modified to include automatic call prevention for Digital Selective Calling on VHF channel 70 (156.525 MHz) for non-distress calls when the frequency is occupied. Technical characteristics of 121.5/243 MHz Emergency Position Indicating

Radiobeacons (EPIRBs) were amended to improve detection by satellite and with a recommendation for early implementation. Also any changes that affect the maritime service that take effect prior to the 1991 HF frequency revisions, such as clarifying provisions for Morse telegraphy, will be included in this proceeding. Additionally, any changes remaining from the 1983 Mobile WARC that have not been implemented will be included.

2. REVISION OF THE HF MARITIME MOBILE BAND (Changes effective July 1, 1991)

A major task of the Conference was to incorporate the new bands allocated by the 1979 WARC, and to rearrange the channelling of the high frequency bands that had not been revised since 1974.

Frequency Allocations: Complete the revision of Section 2.106 for all changes effective in July, 1991. Because the HF revisions and the GMDSS are closely tied, the changes to the Table of Frequency Allocations will include both provisions for the HF bands and those necessary to implement the GMDSS.

HF Frequency Revisions: In rearranging the HF maritime bands, the Conference adopted 3 kHz spacing for radiotelephony and increased the number of frequencies for telephony, DSC, and narrow band direct printing (NBDP) telegraphy. It has been agreed by the FCC and Interdepartment Radio Advisory Committee (IRAC) to split these new frequencies evenly between government and non-government. The specific frequencies are being coordinated currently with NTIA. Frequency tables contained in the maritime service rules, 47 C.F.R. Part 80, will be revised as necessary.

Distress and Safety Provisions: Except for some minor changes, the Conference maintained the existing distress and safety system through the transition period until full implementation of the GMDSS. Thus, only a few changes, such as to clarify the intent of the watch requirement for coast stations in the 2182 kHz band, are needed.

(Note: A First Report and Order is anticipated to give licensees as much notice as possible of the transfer of existing frequencies before the July 1, 1991 required date. A Second Report and Order may be necessary to adjust the frequencies if changed by the International Frequency Registration Board.)

3. GLOBAL MARITIME DISTRESS AND SAFETY SYSTEM (GMDSS)

The development of the GMDSS was initiated within the International Maritime Organization (IMO) in 1978 for ships covered by the Safety of Life at Sea (SOLAS) Convention. It represents the first major revision of distress communications at sea, since the changes resulting from the *Titanic* disaster. Taking advantage of satellite technology and terrestrial techniques, GMDSS is a ship-to-shore distress system, rather than a ship-to-ship system. Automated, and with a global range, it will provide a new standard of safety for seafarers worldwide. The Conference included provisions for the future GMDSS to be implemented in a new Chapter [N IX] of the International Radio Regulations. The implementation schedule for the GMDSS will be decided at the IMO Conference to be held in late 1988. Both Conference requirements, as well as rules pertaining to voluntarily fitted vessels, will be incorporated in the Commission's Rules pending changes to the Communications Act of 1934, as amended.

Details may be obtained from Kathryn S. Hosford, International Liaison Staff, Private Radio Bureau, phone number 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 23, 1988

NEW HIGH FREQUENCY (HF) CHANNELS FOR MARITIME MOBILE SERVICES SPLIT EQUALLY BETWEEN GOVERNMENT AND NON - GOVERNMENT USERS

The FCC and Government agencies, through the Interdepartment Radio Advisory Committee (IRAC), have agreed on the domestic disposition of additional maritime mobile HF channels. These channels were made available by the World Administrative Radio Conference for the Mobile Services (Conference), held in Geneva from September 14 to October 17, 1987. The Conference substantially revised the maritime mobile HF bands between 4000 and 27500 kHz to incorporate several new bands that were allocated by the 1979 World Administrative Radio Conference. By revising Article 60 and Appendices 16, 31, and 32 of the International Radio Regulations, additional channels for duplex radiotelephony, simplex radiotelephony, digital selective calling, and narrow-band direct printing (NBDP) radiotelegraphy were made available. The existing channels for these services also were re-aligned. These changes will affect ship and coast station assignments worldwide and will become effective on July 1, 1991.

The FCC, along with other government agencies, is currently developing domestic provisions for implementing the new channels, as well as the re-alignment of existing channels, in the maritime mobile HF bands. The FCC and IRAC have adopted a plan to divide the new duplex channels equally between government and non-government users. (*See* attached summary.) This split, based on equal requirements for the government and non-government sectors, is consistent with the plan developed by the U.S. in preparation for the Conference. The new simplex channels, however, will not be split but will continue to be shared between government and non-government users, and assigned on an "ad hoc" coordinated basis.

The FCC will initiate a rule making proceeding early in 1990 to incorporate the new channels, as well as to re-align the existing channels, in the Rules. Thus, sufficient notice will be provided, prior to the July 1, 1991 effective date, to permit adequate time to process applications for the new channels.

Details may be obtained from Kathryn S. Hosford, International Liaison Staff, Private Radio Bureau, phone number 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

GOVERNMENT/NON-GOVERNMENT CHANNEL UTILIZATION PLAN

The utilization plan for new, additional channels from WARC 87 is as follows:

DUPLEX RADIOTELEPHONY

MHz (Band)	Number of new Government Channels	Number of new Non-Government Channels
4	1	2
1	1	1
8	3	2
12	4	5
16	8	7
18	7	7
22	6	7
25	5	4
TOTAL	35	35

NBDP PAIRED RADIOTELEGRAPHY

MHz (Band)	Number of new Government Channels	Number of new Non-Government Channels
4	2	2
6	5	5
8	6	6
12	49	49
16	61	62
18	23	22
22	34	34
25	20	20
TOTAL	200	200

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of 8330-SM
C9-104

KELLY BROADCASTING COMPANY,
Licensee of Television Station KCRA-TV,
Sacramento, California

For Declaratory Ruling

STAFF RULING

Adopted: November 14, 1988; Released: November 15, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for declaratory ruling filed by Kelly Broadcasting Company, licensee of television station KCRA-TV, Sacramento, California. KCRA-TV seeks a determination that appearances by legally qualified candidates during the television program series "Public People, Private Lives," are exempt from the equal opportunities requirement as "bona fide news interviews" under Section 315(a)(2) of the Communications Act of 1934, as amended. We grant the request and find that "Public People, Private Lives" is a bona fide news interview program.

2. Kelly Entertainment Company, a subsidiary of the licensee, produces "Public People, Private Lives" for syndication. This company, together with its parent organization, Kelly Broadcasting Company, control the contents of the program.

3. KCRA-TV states that "Public People, Private Lives" is a weekly one-hour program that was to begin October 1, 1988, and was to continue at least through the 1988-89 television season. It will be broadcast on KCRA-TV and numerous other television stations. According to KCRA-TV, "each program will feature 'on location' interviews by Sarah Purcell with three or four prominent individuals from a wide range of fields, including politics, entertainment and sports." Interviewed guests thus far have included New York Mayor Ed Koch, Malcolm Forbes, Cybill Shepherd, Brooke Shields, Kareem Abdul-Jabbar and Judith Krantz. KCRA-TV further states that it plans to invite legally qualified candidates to appear. However, KCRA-TV asserts that no such interview will be conducted with the intent to advance any individual's candidacy. Additionally, KCRA-TV states that all decisions as to the format, content, and participants of "Public People, Private Lives" are based on the producers' reasonable good faith journalistic judgment and newsworthiness.

4. KCRA-TV contends that the news interview segments of "Public People, Private Lives" meet all the criteria for a "bona fide news interview" exemption under Section 315(a)(2) of the Communications Act. As such, KCRA-TV seeks a ruling that appearances by candidates on the news interview segments are considered exempt programming and should not be subject to the equal opportunities requirement.

DISCUSSION

5. Section 315 of the Communications Act provides that if a broadcaster permits a legally qualified candidate for public office to "use" a station's facilities, it must afford equal opportunities to all other candidates for that office. In 1959, Congress amended this section in an effort to encourage increased news coverage of political campaign activity. They exempted from the equal opportunities requirement appearances by legally qualified candidates on the following four categories of news programming:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program falls under the "bona fide news interview" exemption, the Commission considers three factors: (1) whether it is regularly scheduled; (2) whether the broadcaster controls the program; and (3) whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance any individual's candidacy. *See U. S. News and World Report, L. P.*, 2 FCC Rcd 7101 (1987).

6. Based on the information provided by KCRA-TV, it appears that the news interview segments of "Public People, Private Lives" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). The program is regularly scheduled to air on a weekly basis. The licensee asserts that it and its production subsidiary are jointly responsible for the production and control of the program. The licensee, with its production subsidiary, makes the decisions about the format, content and participants of the program based on good faith journalistic judgment and newsworthiness, with the intent to provide information to its audiences on prominent public figures, rather than the desire to oppose or advance any candidacies.

7. While KCRA-TV indicates that "Public People, Private Lives" occasionally features topics that could be characterized as entertainment, this does not preclude the news interview segments of the program from exempt status. *See Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984) (Donahue). Further, although KCRA-TV states that the broadcasts of the program are to begin on October 1, 1988, the Commission has stated that a program's mere proximity to an election would not, by itself, exclude the program from exempt status. *See U. S. News and World Report, L. P.*, 2 FCC Rcd 7101, 7102 (1987) (The Next President).

8. In view of the foregoing, it appears that interview segments with legally qualified candidates on "Public People, Private Lives" may be classified as bona fide news interviews. As such, appearances by legally qualified candidates for public office that are broadcast under the

circumstances described in KCRA-TV's pleading will be exempt from the equal opportunities provision of Section 315.

9. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 10, 1988

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FILES REVISED COST ALLOCATION MANUAL PUBLIC COMMENT INVITED

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission required certain telephone companies to file and obtain approval of manuals containing the methods they use to separate the costs of providing regulated telephone service from the costs of nonregulated activities. On September 15, 1988, the Common Carrier Bureau disapproved the cost allocation manual of the Southern New England Telephone Company. *See The Southern New England Telephone* Company's *Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, DA 88-1342, released September 15, 1988 (SNET Order). In the SNET Order, the Southern New England Telephone Company was directed to file a revised manual within 60 days of the release date of the order.

On November 9, 1988, the Southern New England Telephone Company filed a revised cost allocation manual in accordance with the *SNET Order*.

Parties may file comments on the revised cost allocation manual no later than November 28, 1988. Replies should be filed by December 12, 1988. Comments should reference file number AAD 7-1700. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036.

Copies of the revised manual may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 25, 1988

PLEADING CYLE ESTABLISHED FOR COMMENTS ON US WEST'S PETITON FOR DECLARATORY RULING REGARDING INTERSTATE ACCESS CHARGES

On November 2, 1988, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) filed a petition for declaratory ruling. US West requests that the Commission rule on whether it is proper for US West to assess switched access charges on Centrex-based resellers that offer interstate service to their customers.

US West states that customer premise equipment (CPE)-based resellers, but not Centrex-based resellers, presently are assessed interstate switched access charges in connection with their resale of interstate telephone service. US West believes that this dissimilar treatment is unreasonable and discriminatory.

US West contends that one of the objectives of the Commission's comprehensive access charge plan was to reduce or eliminate discrimination in charges for services. US West argues that the Commission eliminated the access charge exemptions for message telecommunication service (MTS), wide area telephone service (WATS) and non-MTS/WATS resellers in order to distribute the costs of exchange access in a fair and reasonable manner among all users of exchange access. US West contends that Centrex-based resellers are offering interstate services that are functionally and competitively similar to MTS/WATS and non-MTS/WATS services offered by CPE-based resellers. US West states that there are no legal or public policy reasons for treating Centrex-based resellers of interstate services differently from CPE-based resellers of interstate services.

Interested parties should file comments on this petition by **December 22, 1988,** and reply comments by **January 6, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of US West's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE CO. File No. CSG-88-089-P/L

Application for authority to construct an international earth station at Vallejo, California, for the provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: November 15, 1988; Released: November 25, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on September 8, 1988, by American Satellite Co. (Contel ASC), requests authority, pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Vallejo, California, for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on September 21, 1988. No comments were received. The applicant has been granted authority to establish and operate channels of communication between the U.S. and various international points for the provision of IBS service.[1]

2. The proposed earth station will consist of a 13-meter antenna meeting INTELSAT Standard B technical parameters and communicating with INTELSAT satellites in the Pacific Ocean Region (POR) in the 6/4 GHz band. The earth station will be constructed at Vallejo, California, and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. Contel ASC's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. Contel ASC has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT Standard technical parameters. Contel ASC has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is required by the public interest convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-089-P/L IS GRANTED, and Contel ASC is authorized to construct and operate the proposed earth station at Vallejo, California, to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T *et al.*, File No. I-T-C-85-035 *et al.*, Mimeo No. 3220 (released March 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of

IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* American Satellite Co., File No. CSG-85-054-P/L, Mimeo No. 7394 (released October 4, 1985).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTEL COMMUNICATIONS, INCORPORATED — File No. I-T-C-88-211

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1988; Released: November 25, 1988

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on September 16, 1988 by Westel Communications, Incorporated (Westel), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on September 28, 1988. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Westel.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-211, IS GRANTED, and Westel is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

JOHN F. LUHMANN (Assignor) File No. BAPFT-860310TY

and

JOHN W. STARR
(Assignee)

For Commission Consent to Assignment
of Construction Permit for FM
Broadcast Translator Station K240BM
Vail, Colorado

ORDER

Adopted: November 16, 1988; Released: November 25, 1988

By the Chief, Mass Media Bureau:

1. Before the Commission today are: (i) a petition for reconsideration filed by Rocky Mountain Wireless (Rocky Mountain); (ii) opposition to the petition for reconsideration filed by John W. Starr (Starr); and, (iii) the reply filed by Rocky Mountain.

2. By way of background, FM broadcast translator stations are secondary service stations authorized to rebroadcast the signals of full-service FM stations or other FM translator stations to provide FM broadcast service to areas and populations that are unable to receive satisfactory service due to distance or intervening terrain obstructions. On March 25, 1985, John F. Luhmann (Luhmann) filed an application for a permit to construct a new FM translator station to serve Vail, Colorado, with the signal of KSPN-FM, Aspen, Colorado. The KSPN-FM signal was to be received off-the-air via another proposed new FM translator station to be built by Luhmann in Edwards-Avon, Colorado. Luhmann's unopposed application for the Vail translator was granted on August 7, 1985 and the call sign K240BM assigned. Subsequently, Luhmann withdrew his application for the Edwards-Avon translator station. Thereafter, on March 7, 1986, Luhmann filed the subject application to assign the permit for station K240BM to Starr. Rocky Mountain filed an informal objection. The objection alleged that: (i) there was no need for the Vail translator station; (ii) the Vail translator was technically infeasible since Luhmann had withdrawn his application for the Edwards-Avon translator and, therefore, KSPN-FM's signal could not be received off-the-air as required by the rules; and (iii) the assignment application did not contain sufficient information to determine whether the assignee would charge an amount in excess of what the rules permit for the retransmission service.

3. The Chief, Audio Services Division, denied the informal objections. He noted that Rocky Mountain's arguments concerning the feasibility or the need for Luhmann's translator station in Vail were untimely and should have been raised at the time Luhmann applied for the construction permit. The merits of the informal objections were nevertheless considered and rejected because: (1) the alleged deficiencies in the technical proposal could, if necessary, be cured by a minor amendment and, therefore, did not warrant denial or dismissal of the assignment application; (2) Rocky Mountain failed to support its claim that there was no need for the Vail translator station; and (3) all information called for in the assignment application had been furnished and no additional information concerning Starr's motives and intentions was necessary. Rocky Mountain petitioned for reconsideration of the staff's ruling, reiterating the arguments made in its informal objection concerning the feasibility of and need for the Vail translator. For the reasons stated in its previous action, the Chief, Audio Services Division, rejected Rocky Mountain's arguments and denied reconsideration. The Commission, by *Order*, released March 18, 1988 (3 FCC Rcd 1609) denied Rocky Mountain's application for review stating that it had reviewed the staff actions denying Rocky Mountain's objections and found no error.

4. Rocky Mountain now asserts, in its petition for reconsideration, that the Commission did not consider the arguments presented in its application for review in light of the recently released *Notice of Inquiry* 3 FCC Rcd. 3664 (1988), concerning FM translator stations. In Rocky Mountain's view, the issues it has raised regarding the purpose and technical feasibility of the subject translator station are typical of the Commission's concerns underlying the NOI. Rocky Mountain thus asserts that its petition raises new facts which are of concern to the Commission, and, pursuant to Section 1.106(b)(2)(i) of the Rules, its petition for reconsideration should be granted.

5. Section 1.106(b) of the Commission's Rules provides, in part, as follows:

> (2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) the petition relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.
>
> (3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

The petition for reconsideration now under consideration repeats Rocky Mountain's original allegations. Because a *Notice of Inquiry* simply initiates the process of reviewing a Commission policy and no conclusions are reached therein, the issuance of the *Notice of Inquiry* concerning FM translator stations is not the kind of changed circumstance upon which any different conclusion in the instant case might be based. Thus, the petition contains no relevant new facts or changed circumstances that have occurred since the last opportunity to present such matters. Indeed, even if petitioner's allegations had been timely filed against the initial construction permit authorization, we have repeatedly stated that there is in-

sufficient evidence to raise a material question of a lack of need for the facility. We have also repeatedly advised petitioner that the technical deficiency, if any, can be cured with a minor amendment. *See Roaring Fork TV Association, Inc.*, 49 FCC 2d 851 (1974); *Roger D. Olson*, 42 FCC 2d 743 (1973); *Marsh Media, Ltd.*, 18 FCC 2d 164 (1969). Under these circumstances the public interest will be best served by dismissing Rocky Mountain's petition for reconsideration without further consideration.

6. Accordingly, IT IS ORDERED, pursuant to the authority delegated under Section 0.283 and 1.106(b)(3) of the Commission's Rules, that the petition for reconsideration filed April 20, 1988, by Rocky Mountain Wireless, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

WESTERN UNION CORPORATION, Assignor	File Nos. 1982-DSE-AL-88(4) 1983-DSS-EXT-88 1984-DSS-ML-88 1985-DSS-ML-88 1986-DSS-ML-88 1987-DSS-ML-88

and

HUGHES
COMMUNICATIONS
GALAXY, INC.
Assignee

Application for Consent to Assignment
of Licenses

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 1988; Released: November 25, 1988

By the Chief, Common Carrier Bureau:

1. Western Union Corporation (Western Union) and Hughes Communications Galaxy, Inc. (Hughes) (collectively, the Applicants) request that the Commission consent to the assignment of the licenses and authorizations used in connection with Western Union's domestic fixed-satellite 4/6 GHz "Westar" system. The Westar system consists of three operational satellites, Westar III, Westar IV and Westar V, and the fully constructed, unlaunched Westar VI-S which will replace Westar III at the end of Westar III's operational life. The Applicants also request that the Commission extend the current launch deadline for Westar VI-S for 18 months. Finally, Hughes seeks authority to operate all transponders on all of the Westar satellites on a noncommon carrier basis. For the reasons discussed below, we grant the Applicant's Westar system assignment request and the Westar VI-S launch extension request. Finally, we grant Hughes's request to operate on a noncommon carrier basis all of the Westar system's transponders that are not currently owned by other entities.

BACKGROUND

2. Western Union was granted its authorizations and licenses for its Westar III, IV and V satellites in 1979 and 1981.[1] It states its Westar satellite network provides video, audio and other services to a variety of users.

3. Hughes owns and operates the Galaxy satellite system, consisting of three in-orbit 4/6 GHz domestic communications satellites: Galaxy I, Galaxy II and Galaxy III. It also is authorized to launch a fourth 4/6 GHz satellite, Galaxy IV, that is currently being constructed.[2] Hughes Communications, Inc. owns 100 percent of the outstanding stock of Hughes. The sole stockholder of Hughes Communications, Inc. is Hughes Aircraft Company. Hughes Aircraft Company is wholly owned by GM Hughes Electronics Corporation which in turn is a wholly-owned subsidiary of General Motors Corporation.

4. The proposed transaction between Western Union and Hughes, as evidenced by the Purchase Agreement (Agreement) dated May 16, 1988, entails Hughes purchasing the Westar system. The Agreement provides that Hughes will acquire the three operational in-orbit Westar satellites and the already constructed Westar VI-S. [3] No earth station authorizations are being assigned in this transaction, although Hughes will acquire satellite tracking, telemetry and control (TT&C) and other related ground-support equipment that will enable Hughes to continue uninterrupted service to current Westar system users. Under the agreement, HCG Communications Satellite Services, Inc., Hughes's wholly owned service company subsidiary that provides TT&C for Hughes's existing Galaxy satellite system, will provide TT&C to Western Union for the transponders owned by Western Union's customers.

5. American Satellite Company, d/b/a Contel ASC (Contel ASC), Home Box Office, Inc. (HBO) and the Public Broadcasting Service (PBS) filed comments and IDB Communications Group, Inc. (IDB) filed a petition to deny the Applicant's license assignment request. The issues raised in these pleadings fall into three categories:

a) Contel ASC and PBS, both owners of transponders on the Westar system, request that the Commission either postpone or condition the Western Union/Hughes assignment to protect the needs and interests of the transponder owners.

b) IDB, which leases (or leased) capacity from Western Union on a common carrier basis, asserts that the withdrawal of all Westar transponders from common carrier service would be contrary to the public interest and would unduly restrict available capacity in the broadcast quality audio services market.[4]

c) HBO, neither a Westar system transponder owner nor user, argues that the Commission should reconsider WESTAR VI-S's 91° W.L. orbital assignment during the deliberation over the current satellite application processing round, presumably to use that location to accommodate other satellites in the current processing group.[5]

We will address each of these issues in turn.

DISCUSSION

Private Contractual Relationships

6. Since the Commission released the *Transponder Sales Order*,[6] satellite operators have had the option of offering communications services on their satellites' transponders on a common carrier or noncommon carrier basis by sale. A transponder sales contract conveys to the purchaser an exclusive ownership right in a specific transponder on a particular satellite spacecraft during the useful life of the

transponder. The purchaser may use the property thus acquired as collateral for loans, and may enjoy other benefits of transponder ownership such as depreciation deductions. Although the benefits of satellite transponder ownership are many and varied, ownership of transponders, like other major assets, comes with attendant risk.

7. PBS and Contel ASC, both owners of Westar system transponders, assert, and Western Union agrees, that Hughes will assume some of the contracts and liabilities of Western Union, but will not assume Western Union's contracts with PBS and Contel ASC or other transponder owners.[7] These transponder sales contracts set forth the obligations and duties of the parties to the PBS/Western Union and Contel ASC/Western Union transponder sales.[8] Western Union asserts that notwithstanding the instant assignment request, its contracts with PBS and Contel ASC will continue to be binding agreements with Western Union. Western Union contends that the rights of the transponder owners under these contracts will not be affected by the sale and it will continue to be responsible for all of its liabilities arising out of them.[9] Western Union and Hughes assert that their Agreement has been structured in such a way as to enable Western Union to fulfill all of its contractual obligations to its customers. Further, the Applicants contend that Hughes is interested in maintaining and expanding the Westar system customer base. Contel ASC and PBS are not as optimistic, however, and request that the Bureau delay the assignment of the Westar system to Hughes until they are satisfied their interests will be protected or at least condition the assignment so that their interests are protected.

8. Through their instant request, the Applicants seek to assign Western Union's ownership interest in the Westar system to Hughes, so that, if approved, Hughes would be the new licensee of the Westar system. Western Union's ownership interest in the Westar system does not include the transponders owned by Contel ASC and PBS. Therefore, Western Union could not transfer and Hughes could not receive ownership rights to the commenters' transponders. Thus, Hughes could not exert direct ownership over the commenters' transponders. However, ownership and control of the satellite spacecrafts are being assigned to Hughes and as licensee, Hughes is required to control and operate its spacecraft in accordance with the Communications Act and the Commission's rules.[10]

9. The considerable investment PBS and Contel ASC have made in the purchase of Westar transponders, alone, cannot constrain the bargained for transfer of the Westar system to Hughes. PBS and Contel ASC bought their transponders under contract with Western Union and to date, they have made no allegation of a breach of that contract. Even if there were a current breach, the Commission generally is not the appropriate forum to resolve private contractual disputes. Had PBS and Contel ASC wished additional protection of their interests in the event of a possible dissolution, bankruptcy or reorganization of the current satellite licensee, Western Union, they could have bargained for that protection in the contract negotiation with Western Union. In any event, neither Contel ASC nor PBS has provided a basis at this time for Commission ordered conditions.[11] Thus, although we decline to postpone or condition the Western Union/Hughes assignment to protect the needs and interests of the transponder owners, we condition the assignment on the condition that all existing terms and conditions applicable to the authorizations held by Western Union and Hughes shall remain in full force and effect.

Common Carrier Transponder Pool

10. The second issue raised in this proceeding is whether the withdrawal of the balance of the Westar system's transponders from common carrier service will affect the general availability of satellite transponder common carrier capacity in a way that is not in the public interest. IDB asserts that the supply of common carrier transponders is becoming sufficiently restricted that no further removals from common carrier service are justified without a hearing. IDB further contends that an investigation or hearing is required by the Commission's policy regarding transponder sales to ensure that adequate common carrier capacity is retained to meet the service needs of customers and that there is adequate competition in the broadcast quality audio services market. We disagree.

11. In the *TransponderSales Order*, the Commission found that the public interest would be served by authorizing domestic satellite communications system licensees to make a limited part of their transmission capacity available to end users on a noncommon carrier basis by sale. The U.S. Court of Appeals reviewed the Commission's decision in the *Transponder Sales Order* in *Wold* [12] and was "persuaded by the record that the FCC, in authorizing a limited departure from the status quo, acted within its discretion" (*Wold* at 1469) in authorizing the sale of satellite transponders. The court stated, however, it expected the Commission to continue to examine transponder sales applications in light of all factors relevant to the public interest calculus, and to monitor the results of the course it was pursuing. *Id.* at 1476.

12. It has been six years since we first authorized transponder sales and our experience has been that they have resulted in the benefits that were anticipated. Especially significant is that such sales offer a means by which licensees can share the risks associated with the launch and operation of a satellite system. The reliance on transponder sales has not been at the exclusion of common carrier transactions, however. We continue to monitor the effect our transponder sales authorization policy has had on the domestic satellite industry, and we find that the number of common carrier transponders has increased by more than 80 percent from the time the policy was established in 1982.[13] The Commission has stated that "domestic satellite licensees should be routinely authorized to offer transponders on a noncommon carrier basis absent a showing that it would not be in the public interest by a petitioner. Absent such a showing, [the Commission] will not view any particular percentage of noncommon carrier transponders as a *prima facie* limit."[14] IDB has not made a showing or even alleged that it could or would not be able to lease transponders on a common carrier basis from some satellite operator so that it can continue to provide broadcast quality audio services.[15] In fact, an increasing pool of common carrier transponders exists throughout the overall domestic satellite network. Nor has any other user of Western Union's common carrier transponders voiced opposition to Hughes's proposal. In light of these findings, IDB's concerns appear groundless.[16]

The Assignment of 91' W. L.

13. Although HBO takes no position on the merits of the Western Union/Hughes application, it contends that the orbital assignment for Westar VI-S should be reconsidered as part of the Commission's deliberations on the currently pending fixed satellite applications. HBO contends that the "emergency" impetus to replace the failed Westar VI has now past and further asserts that Hughes's intent is to use Westar VI-S as an in-orbit spare satellite. For these reasons, HBO contends that the 91' W.L. orbital location should be used to accommodate the 1988 satellite processing group. We disagree.

14. We will not reassign Westar VI-S to another location. Although shrinking, there is still traffic on Westar III, which currently is operating at 91', and Westar VI-S represents a logical replacement satellite for that traffic as well as for any expansion. Westar VI-S was originally assigned to 91' W.L. and as a result of the 1986 series of launch failures and disruption in launch services, Westar VI-S has not been launched into that position to date. In addition, we will grant Hughes's request for an additional 18 months in which to launch the satellite. The satellite has been constructed and Hughes asserts it can be launched as soon as launch services can be obtained. We do not find that unreasonable, and thus will extend Hughes's launch authority for Westar VI-S 18 months.[17]

15. With respect to the allegation regarding Hughes's proposed use of Westar VI-S, HBO has presented no evidence that it will be an in-orbit spare. Moreover, under Section 25.391 (h) of the Commission's rules, 47 C.F.R. § 25.391 (h), the Commission may require any satellite that is determined to be part of a system which is not essentially filled to be colocated with another satellite in that system.[18] Thus, even if HBO's assertions ultimately prove accurate in this regard, the Commission has the necessary and proper mechanism to ensure that orbital efficiency is maintained.

Effect on Competition

16. Although no comments were filed alleging any specific anticompetitive effects, the Commission is required to consider anticompetitive effects as one part of its public interest finding.[19] In making this assessment, the relevant markets of products competing with the Applicants, as well as the relevant geographic markets, must be defined. Three distinct product markets are involved in conducting this analysis – interexchange telecommunications service,[20] international message telephone service (IMTS), and non-IMTS.[21] Interexchange services are supplied in a single national market, while the geographic markets for all international services are delineated on a country-by-country basis.[22] The Commission has determined that neither Western Union nor Hughes is dominant in any of these defined markets.[23] Prior determinations have concluded that combinations of companies having a greater market presence than Hughes and Western Union did not result in market power. For example, the transfer of control of Satellite Business Systems from International Business Machines Corporation to MCI was found not to result in market power.[24] Given this, Western Union and Hughes together will not have the power to control prices. We therefore find that the proposed assignment raises no anticompetitive concerns in the provision of interstate or international communications services.

CONCLUSION

17. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that the Application File No. 1982-DSE-AL-88(4) IS GRANTED and Western Union Corporation IS AUTHORIZED to assign the above-referenced communications facilities to Hughes Communications Galaxy, Inc. subject to the following condition:

> All existing terms and conditions applicable to the authorizations held by Western Union and Hughes shall remain in full force and effect.

18. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc.'s Application File No. 1983-DSS-EXT-88 IS GRANTED and authority to launch the Westar VI-S satellite IS EXTENDED to April 1989.

19. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc.'s Application File Nos. 1984/1985/1986/1987-DSS-ML-88 ARE GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to make available, on a noncommon carrier basis, up to 9 transponders on Westar II, 14 transponders on Westar IV, 15 transponders on Westar V, and 14 transponders on Westar VI-S.

20. IT IS FURTHER ORDERED that the Petition to Deny filed by IDB Communications Group, Inc. IS DENIED.

21. The grantees are afforded thirty days to decline this authorization as conditioned. Failure to respond with this period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Westar III was authorized in Western Union Telegraph Co., FCC 79-444, released July 24, 1979. Westar IV and V were authorized in Western Union Corporation, 86 FCC 2d 196 (1981). Western Union was granted authority to construct, launch and operate Westar VI-S as an emergency replacement satellite for the failed Westar VI satellite. Western Union Telegraph Co., Application File No. 1144-DSS-P/LA-84 (September 11, 1985).

[2] Hughes Communications Galaxy, Inc., 103 FCC 2d 663 (1985). Hughes also has requested authority to contruct, launch and operate a fifth 4/6 GHz satellite and two 12/14 GHz satellites. *See* Application File Nos. 6015, 6016, 6017-DSS-P/LA-87.

[3] In addition, Western Union has filed applications for replacement satellites for Westars IV and V as an "accommodation" to Hughes. *See* Application File Nos. 2284, 2285-DSS-P/LA-88.

[4] It is unclear whether IDB is currently a customer on the Westar system. IDB states that it "abandoned Westar III on October 31, 1987" after the satellite ceased north-south stationkeeping. IDB also stated that it would not accept substitute service on Westar IV for the remainder of the contract term. Western Union subsequently brought suit to compel IDB to pay for the balance of its contract term. Western Union Corp. v. IDB

Communications Group, Inc., Civil Action No. CV-88-0489, U.S. District Court for the Eastern District of New York, filed February 12, 1988.

[5] In response to Public Notice, Report No. DS-635 (released June 10, 1987), seven applicants filed applications for new or replacement domestic fixed-satellites. These applications will be considered together as the current domestic fixed-satellite processing group.

[6] Domestic Fixed-Satellite Service: Transponder Sales, 90 FCC 2 *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984) (*Wold*).

[7] *See* PBS Reply Comments at 3; Western Union Opposition and Comments at note 4.

[8] These transponder sales agreements include provisions for the seller to provide the buyer with, among other things, TT&C services and backup transponder capacity.

[9] *See* Western Union Opposition at 4.

[10] *See generally*, 90 FCC 2d at 1257-58.

[11] *See, e.g.*, 47 U.S.C. § 303 (r).

[12] *Wold*, *supra* note 6.

[13] In 1982, 376 transponders were authorized for common carrier service. Today, assuming all pending applications of the 1988 processing group are granted, more than 700 transponders will be authorized for common carrier service.

[14] Martin Marietta Communications Systems, Inc., 51 Fed. Reg. 24223 (July 2, 1986).

[15] Moreover, we reject IDB's unsupported contention that the number of transponders that are capable of providing broadcast quality audio services is limited. We see no reason why all available transponders cannot be used to provide this service.

[16] Also, IDB asserts that the Applicants' application is incomplete because the consideration to be paid has been blanked out of the contract, thereby making it impossible to evaluate the assignee's qualifications. IDB states the appendices to the contract are omitted, thus depriving the Commission of details regarding contracts to be assumed and pending litigation affecting the transaction. IDB further contends that Western Union is taking inconsistent positions in different forums, in that "it has brought suit against IDB for failure to utilize common carrier service until 1991 while at the same time proposing to discontinue such service." IDB Petition to Deny at n. 1. IDB's allegation regarding the inadequacy of information submitted is without merit because the Applicant's submission contains all the information necessary for us to determine whether grant is in the public interest. Moreover, Hughes qualifications as a satellite licensee are a matter of record before the Commission. Further, Western Union's position in the pending District Court case (*see supra* note 4) is not relevant to our determination as to whether Hughes should be assigned the Westar licenses and authorized to sell the Westar transponders.

[17] We do not contemplate any further extensions on this matter. Hughes should be able to obtain launch services within that time frame.

[18] Section 25.391 (h) provides that:

> In the event that one or more applications satisfying the requirements of this section are ready for grant, any orbital location occupied by a satellite that is determined to be a part of a system that is not essentially filled may be cancelled and colocation of in-orbit satellites may be required. The Commission may take this action if, in so doing, it would allow the grant of pending applications that satisfy the requirements of this section. If a cancellation is made, the licensee will be afforded a period of 30 days to notify the Commission which of its assigned locations should be cancelled.

47 C.F.R. § 25.391 (h).

[19] *See, e.g.*, GTE Corporation and Southern Pacific Company, 94 FCC 2d 235, 249 (1983) (GTE/SPC); 15 U.S.C. § 21.

[20] In Competitive Carrier Services, Fourth Report and Order, 95 FCC 2d 554, 573 (193) (*Competitive Carrier*), the Commission defined all domestic interexchange telecommunications as a single product market. Although Hughes and Western Union use various mixes of satellite and microwave technologies, satellite and terrestrial communications have never been viewed as distinct submarkets. *Id.* at 567; GTE Corp./SPC, 94 FCC 2d at n. 39; Satellites Business Systems, Inc., 62 FCC 2d at 997 (1977), *recon. denied*, 64 FCC 2d 872 (1977), *aff'd sub nom.*, U.S. v. FCC, 652 F. 2d 72 (D.C. Cir. 1980).

[21] In International Competitive Carrier Policies, FCC 85-585 (released November 15, 1985) (*International Carrier*), the Commission concluded that international telecommunications services are comprised distinct product markets, IMTS and non-IMTS. Non-IMTS includes telex, telegram, TWX, private line, high and low speed data, videoconferencing, and International Business Service.

[22] *Competitive Carrier*, *supra* note 20, at 574; *International Carrier*, *supra* note 21, at para. 68.

[23] Competitive Carrier, *supra* note 20, at 575; *International Carrier*, *supra* note 21, at paras. 43 and 51.

[24] Transfer of Control of Satellite Business Systems from International Business Machines Corporation to MCI Communications Corporation, Application File Nos. 18, 19-DSS-TC-86, released February 14, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-82

In re Applications of

GNOL BROADCASTING, INC. FCC File No. BPCT-861030KG

R. L. BUSH, JR. FCC File No. BPCT-861216II

For Construction Permit for a New
Commercial Television Station
Morganton, North Carolina

Appearances

Bradford D. Carey, *James J. Popham*, and *Gregory H. Guillot*, on behalf of GNOL Broadcasting; *Thomas L. Root*, and *Cary S. Tepper*, on behalf of R. L. Bush, Jr.; and *Linda Bocchi*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: November 10, 1988; Released: November 25, 1988

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of GNOL Broadcasting, Inc. (GNOL) and R. L. Bush, Jr. (Bush) for a construction permit for a New Commercial Television Station at Morganton, North Carolina. At the time of designation for hearing, the case included four additional applications, those of Dr. James Wingate (File No. BPCT-861114KJ); Cynthia Blair d/b/a Tar Hill Television (File No. BPCT-861216IG); John J. Garofalo d/b/a Skyway Television (File No. BPCT-861216IJ); and Joel J. Kinlow, Jr. (File No. BPCT-861216IK). The applications of Dr. James Wingate, Tar Hill Television and Skyway Television were collectively dismissed with prejudice by *Order*, FCC 87M-1887, released August 11, 1987, for failure to prosecute. The application of Joel J. Kinlow, Jr. was dismissed by *Order*, FCC 87M-3352, released December 23, 1987, at the request of that applicant.

2. The applications were designated for hearing on the standard comparative issue. The *Hearing Designation Order*, DA 87-330, released April 10, 1987, also specified an air hazard issue against each of the applicants. In addition, an issue was specified against Bush to determine whether his proposal is consistent with Section 73.610 of the Commission's Rules, and, if not, whether circumstances exist which would warrant a waiver of the rule.

3. By *Order* (FCC 87M-2544), released October 13, 1987, the air hazard issue specified against GNOL was resolved in its favor. On December 17, 1987, the Federal Aviation Administration issued a determination that the proposed facilities of Bush would not be a hazard to air navigation. A copy of said determination was received in evidence at the hearing as Bush Exhibit No. 3. On August 25, 1987, Bush filed his "Amendment As a Matter of Right" on the short-spacing issue specified in the Designation Order. By *Orders* (FCC 87M-2545 and 87M-3251) released October 13, 1987 and December 11, 1987, respectively, Bush's amendment was accepted and the short-spacing issue was resolved in his favor.

II. FINDINGS OF FACT

A. GNOL Broadcasting, Inc.

4. GNOL Broadcasting, Inc. (GNOL) is a corporation organized under the laws of the State of North Carolina. (GNOL Ex. 1, p.1). Mr. Thomas E. S. Long, Jr., owns 100% of the issued and outstanding voting stock of GNOL. GNOL has no other shareholders. GNOL's directors and the offices they hold (if any) are:

NAME	Position
Thomas E. S. Long, Jr.	President & Treasurer
Melanie M. Katz	Secretary
Keith S. Buff	

5. Mr. Long will serve full-time as general manager of GNOL's proposed station and will devote a minimum of forty (40) hours per week to his duties. As general manager, Mr. Long will supervise overall station operations and be directly responsible for development and implementation of all station policies. (GNOL Ex. 4, p.1).

6. Mr. Long will oversee and supervise all department heads including such positions as program director, news director, public affairs director, production manager, chief engineer and sales manager. He also will oversee and supervise the business and financial aspects of the station's operations and performance and will supervise all station employees directly or indirectly. (*Id*).

7. Mr. Long was born on October 11, 1954, in Hickory, North Carolina. (GNOL Ex. 5, p.1), and graduated from high school in 1973 in Hickory, North Carolina. (*Id*). He served as director of engineering at WHKY(AM), WHKY-FM and WHKY-TV from 1977 until 1985. He was a full-time employee at those stations from 1970 until 1985. Mr. Long served as chief engineer of station KLTJ-TV, Irving, Texas, on a full-time basis from October 1985, through May 1986. Concurrently, he served on a part-time basis as chief engineer of non-commercial FM station KVTT, Dallas, Texas. He is presently employed at station WJZY-TV, Belmont, North Carolina as transmitter supervisor. Additionally, Mr. Long serves as consulting engineer for WHKY (AM)-TV. (Tr.22).

8. Mr. Long is a life-long resident of Hickory, North Carolina, within the predicted city grade contour of GNOL's proposed station (GNOL Ex. 5, 2). If GNOL's application is granted, Mr. Long will move to the city of Morganton, North Carolina, and will maintain no residence other than in Morganton. (*Id*).

9. Mr. Long has been active in the following civic/charitable and professional organizations within the predicted Grade B contour of GNOL's proposed station:

PROJECT
Hickory, NC Police Department

INVOLVEMENT
Unpaid consultant to police department for communication matters, from 1975 to the present. He spends about 50 hours per year on this activity.

PROJECT
City of Hickory, Water & Sewer Dept.

INVOLVEMENT
Unpaid consultant, designing and maintaining water level and flow monitor systems, and/or assisting therewith, from 1982-1987. He spent about 20 hours per year on this activity.

PROJECT
Hickory City Schools

INVOLVEMENT
Designed, installed, maintained and operated audio, visual and video equipment and distribution systems, from 1969 to 1973. He spent about 800 hours per year on this activity.

(GNOL Ex. 5, p.3).

10. Mr. Long's father and mother have held various positions, offices, directorships and stock ownerships in Catawba Valley Broadcasting Company, Inc. Mr. Long worked at the stations while growing up and, after graduating from high school, was employed full-time with the stations until October 1985. (GNOL Ex. 5, p. 3-4).

11. Mr. Long held the position of director of engineering for WHKY(AM), WHKY-FM and WHKY-TV from 1977 through 1985. Though no longer employed on a full-time basis, Mr. Long continues to consult for WHKY(AM) and WHKY-TV. If GNOL is granted a construction permit, Mr. Long will cease his consulting activities for WHKY(AM) and WHKY-TV, before commencing program test operations at GNOL's station. (GNOL Ex. 5, p.4).

12. Mr. Long served on a full-time basis as chief engineer of station KLTJ-TV, Irving, Texas, from October 1985, to May 1986. Simultaneously, on a part-time basis, he served as chief engineer of non-commercial, educational FM station KVTT, Dallas Texas. (*Id*).

13. Additionally, Mr. Long has served as a video consultant since 1973 and consulting engineer since 1975. He has consulted for approximately 35 stations on engineering and engineering management matters. (*Id*).

14. Examples of Mr. Long's consulting engineering activities include the construction of new stations KBFD(TV) and KDSC(TV), Honolulu, Hawaii. On behalf of the station's permittees, Mr. Long constructed new television stations, adjusted them for proper operation, and oversaw the commencement of operation of the stations. (*Id*).

15. Mr. Long typically spends approximately 20 hours per month performing consulting services for WHKY(AM) and WHKY-TV (Tr. 24). At the time of hearing, Mr. Long was devoting 50 or 60 hours a week to WJZY(TV), Belmont, North Carolina. (Tr. 26). During the prior year, Mr. Long also had served as a consultant to WGGS-TV, Greenville, South Carolina; KMCT, West Monroe, Louisiana; KTXA; KXTX, Dallas, Texas; and KLTJ, Irving, Texas. (Tr. 23-30).

16. If GNOL is granted a construction permit, Mr. Long will cease or greatly reduce his consulting engineering activities. In no way will his consulting engineering activities be permitted to interfere with his commitment to work full-time at GNOL's station. (GNOL Ex. 5, p.5).

17. Mr. Long has committed to cease his employment with WJZY before commencing program tests with GNOL's proposed station, if GNOL is granted a construction permit. The management of stations WJZY and WHKY are aware of Mr. Long's commitment to cease consulting for them. (Tr. 61). Mr. Long has an agreement with WHKY(AM) and television and WJZY(TV) that he will cease working for them prior to commencing operations pursuant to program test authority on GNOL's proposed station, if granted a construction permit. (Tr. 61).

B. R. L. Bush, Jr.

18. R. L. Bush, Jr. (Bush) is an individual applicant. He presently resides, and has resided for the past thirty (30) years, in Lenoir, North Carolina, within the predicted city grade contour of the proposed station. He does not propose to move to Morganton, North Carolina, in the event of a grant. (Bush Ex. 1).

19. Bush proposes to serve as general manager of the station and will devote thirty (30) hours per week to the position. As general manager, Bush will have overall responsibility for the management of the station, including programming, sales, and hiring and firing of all personnel. All other station employees will report to him. He will hold no other employment, except that he will continue to devote such time to the management of his automobile dealership and other business interests as will not interfere with his 30-hour weekly commitment to the station (Bush Ex. 1).

20. Bush is president and sole stockholder of Bush, Inc., an Oldsmobile-Pontiac-GMC dealership, located near Lenoir, North Carolina. Under the franchise agreement that Bush, Inc has with the General Motors Corporation, his daughter, Barbara Parsons, is entitled to become the franchisee upon his death or retirement. Barbara Parsons presently serves as general manager of the company. Bush devotes no more than 20 hours weekly to the affairs of the business. (Bush Ex. 1; Tr-72). Bush has been grooming his daughter to take over the dealership should he die or retire. She has been approved by General Motors to run his dealership (Tr-83).

21. Bush is the eighty percent stockholder of Bush-Parsons, Inc., a Chrysler dealer, also located near Lenoir, North Carolina., The dealership is managed by his son-in-law, who is named in the dealership's franchise agreement wit the Chrysler Corporation as an approved dealer. Bush is selling the dealership to his son-in-law in increments. He devotes no time weekly to Bush-Parsons, Inc., and probably only about five (5) hours annually. (Bush Ex.1).

22. Bush is chairman of the board and holds approximately ten percent of the stock of Caldwell Savings Bank, Lenoir, North Carolina. He presently devotes five to six evenings monthly to the affairs of the bank. (Bush Ex. 1, TR-76).

23. Bush is president, a director and seventy-one percent stockholder of Bush-Carswell, Inc., a used car and junkyard business in Lenoir, North Carolina. He devotes about one hour per month to that business. (Bush Ex. 1).

24. Bush is an investor in several other business: Western Carolina Tire (a subsidiary of Bush, Inc.), Hi Briten Development Corporation (landlord to the Cedar Rock Country Club) and the LRB Corporation (owner of a building that houses a theater). Bush's only involvement with these businesses is to receive monthly income, and nothing more. (TR-76,77,84).

25. Bush owns all of the stock of Furniture City Broadcasters, licensee of standard broadcast station WKGX, Lenoir, North Carolina, which interest he has pledged to divest in event of the grant of his application. He also held ten (10) percent of the stock of Trio Broadcasters, Inc., licensee of standard broadcast station WMOO and WBLX(FM), Mobile, Alabama, at all times relevant to the comparative status of his application in this proceeding (although he no longer owns such interest), and he presently owns ten (10) percent of the stock of Beasley Broadcasting Company, licensee of standard broadcast station WFAI, Fayetteville, North Carolina. (Bush Exs. 1 and 2).

26. Bush has been a member of the Lenoir Chamber of Commerce for the past thirty (30) years, either in his own name or through one or more of his businesses. However, he has not been an active member for the past seven or eight years. He served on the Lenoir City Council from 1962 through 1968, and has been a member of the Lenoir Lion's Club for 35 years (the last ten of which have been as a member *emeritus)*. Also, from 1962 through 1986, Bush served on the Alexander, Burke and Caldwell County Appalachian Board, appointed by the county commissioners. The board was responsible for allocating government grant money to areas in need of the grants in Alexander, Burke and Caldwell Counties, North Carolina. Morganton is located in Burke County. (Bush Ex.1).

27. Bush has served as a member and head usher of the First United Methodist Church, Lenoir, North Carolina for the past forty (40) years. (Bush Ex. 1, TR-81).

C. Comparative Coverage

28. Following are the areas and populations to be served by the GNOL Broadcasting, Inc. and R.L. Bush, Jr.

Applicant	Area (Sq. Mi.)	Population
Bush	12,770	658,423
GNOL	17,998	1,314,545

29. The areas are well-served. A minimum of five video services are provided to the areas to be served by the applicants. (Joint Engineering Exhibit).

III. CONCLUSIONS OF lAW

Air Hazard Issue

30. This issue is resolved in favor of Bush. Bush Ex. No. 3, a determination of no hazard to air navigation issued by the Federal Aviation Administration, is conclusive of the matter.

STANDARD COMPARATIVE ISSUE

GNOL Broadcasting, Inc.

31. Mr. Long, GNOL's sole shareholder, will serve on full-time day-to-day basis as general manager of GNOL's proposed station and will devote a minimum of 40 hours per week to his duties and responsibilities as general manager. He will supervise overall station operations and be directly responsible for development and implementation of all station policies. He will oversee and supervise all department heads, will oversee and supervise the business and financial aspects of the station's operations, and will supervise all station employees directly or indirectly. The role of general manager is a management level position entitling GNOL to integration credit. GNOL receives 100% quantitative integration credit for Mr. Long's commitment to serve as full-time general manager of GNOL's proposed station.

32. That quantitative integration credit is qualitatively enhanced to a substantial degree by Mr. Long's long-term residence within the city grade contour of GNOL's proposed station, plus his commitment to move to the city of license.

33. Mr. Long has been involved in civic affairs within the city of Hickory, within the city grade contour of GNOL's proposed station. These activities warrant the award of slight qualitative enhancement. Finally in this regard, Mr. Long's integration proposal is enhanced to a minor degree by Mr. Long's broadcast experience.

34. GNOL has no interest in any broadcast radio or television station, cable television system, newspaper or other medium of mass communications. Neither the sole shareholder of GNOL, Thomas E. S. Long, Jr., nor any other officer or director has any ownership interest or position in any instrument of mass communications. Therefore, GNOL receives no diversification demerit under the standard comparative issue.

R. L. Bush, Jr.

35. Bush is entitled to the substantial quantitative integration credit which he claims, i.e., 30 hours per week. As general manager of the proposed station, Bush will have overall responsibility for the management of the station, including programming, sales, and hiring and firing of all personnel. Bush, for the past 30 years, has resided continuously in Lenoir, North Carolina, within the service area of the proposed station. His integration proposal receives substantial qualitative enhancement on that account.

36. Bush has been a member of the Lenoir Chamber of Commerce for the past 30 years, but he has not been active for the past seven or eight years. He served on the Lenoir City Council from 1962 through 1968, and has been a member of the Lenoir Lions Club for 35 years, the last 10 of which have been as a member *emeritus*. Additionally, from 1962 to 1986, Bush served on the Alexander, Burke and Caldwell County Appalachian Board. Bush is entitled to a slight qualitative enhancement for these civic activities.

37. Bush has held 10% of the stock of the licensee of an AM and FM station in Mobile, Alabama, 750 miles from Morganton, at all times relevant to the comparative status of his application in this proceeding. He also owns 10% of the stock of the licensee of WFAI, Fayetteville, North

Carolina, which is located 171 miles from Morganton. Bush is assessed a very slight diversification demerit for these ownership interests.

Comparative Coverage

38. The areas are well-served. GNOL, however, proposes to serve a substantially larger total area and population. Traditionally, only slight preferences have been awarded to applicants having substantial overall coverage advantages, where all the service areas are well-served. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 790-91 (Rev. Bd. 1986). Therefore, although GNOL's proposal will provide service to 656,122 more people and 5,228 more square miles than Bush, the significance of this superiority is diminished by the existence, in that area, of at least five other video services. Accordingly, GNOL is awarded a slight preference over Bush.

IV. ULTIMATE CONCLUSIONS

39. GNOL's 100% full-time integration credit, as opposed to Bush's part-time integration credit, is decisive in this case. *New Continental Broadcasting Co.*, 50 R.R. Id 1117 (Rev. Bd. 1981). In addition, GNOL's qualitative enhancements for Mr. Long's participation (substantial, for long-term service area residency coupled with a promise of future local residency; slight, for civic participation, broadcast experience, and superior coverage) outweigh Long's enhancements (substantial, for long-time service area residency; very slight, for civic activities). Long also suffers a slight diversification demerit, whereas GNOL has none.

Accordingly, IT IS ORDERED that the application of GNOL Broadcasting, Inc. IS GRANTED, and the application of R. L. Bush, Jr., IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-342

In re Applications of

PONTCHARTRAIN BROADCASTING COMPANY, INC.	File No. BPCT-870330KT
Louis E. Jenkins, Jr. d/b/a FLORIDA PARISHES TELEVISION LTD., PARTNERSHIP IN COMMENDAM	File No. BPCT-870421KI

For Construction Permit for a New Commercial Television Station
Hammond, Louisiana

Appearances

Seymour M. Chase and *John J. Schauble* on behalf of Pontchartrain Broadcasting Company, Inc.; *James J. Popham, Bradford D. Carey, Marjorie R. Esman* on behalf of Louis E. Jenkins, Jr. d/b/a Florida Parishes Television, Ltd., Partnership in Commendam; and *Jerry M. Hermele* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: November 18, 1988; Released: November 25, 1988

1. These two applicants are competing for a construction permit for UHF television Channel 62 at Hammond, Louisiana. The following issues designated by the Mass Media Bureau will be decided in this decision (*Hearing Designation Order*, 2 F.C.C. Rcd 5324 (1987)):

1. To determine with respect to Louis E. Jenkins, Jr. d/b/a Florida Parishes Television Ltd., Partnership in Commendam, whether there is a reasonable possibility that the tower height and location it proposes would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced, pursuant to the foregoing issues, which of the applicants should be granted.

2. Hearing sessions to cross-examine witnesses on their written testimony were held on March 28 and 29, 1988. The record was closed on March 29, 1988. *Order*, FCC 88M-929, released April 1, 1988. Proposed findings of fact and conclusions of law were filed by the applicants and the Mass Media Bureau on May 23, 1988 and replies were filed only by the applicants on June 21, 1988.

FINDINGS OF FACT

Issue 1: Whether Florida Parishes Television's (FPT) antenna tower constitutes a hazard to air navigation

3. FPT's site had not been finally approved by the FAA at the time the evidence was exchanged, on March 14, 1988. FPT Exh. 6. On March 29, 1988, the second and final day of the hearing, FPT indicated that its consulting engineer had been told by the FAA that its proposed tower would pose a hazard to air navigation. Tr. 512-13. The record was closed on March 29 and it was, on April 26, 1988, four weeks later, that FPT petitioned for leave to amend to designate a new tower site which it believed the FAA would approve because it had previously approved a proposal for that site. The Mass Media Bureau has reviewed the amendment and supports its acceptance. On May 4, 1988 the FAA approved the new proposal. Pontchartrain opposes granting the petition because FPT did not exhibit due diligence in obtaining FAA approval and it could have foreseen the FAA finding that FPT's original tower site would present a hazard to air navigation.

4. Pontchartrain urges that FPT did not diligently pursue its proposal before the FAA. Pontchartrain claims FPT should have not only asked the FAA for further study, but it should have undertaken an independent investigation, filed comments with the FAA about its proposal, hired an aeronautical consultant, and made status inquiries to the FAA. Pontchartrain maintains that if FPT had made status inquiries during the FAA investigation, it would have known several months earlier that its site was unacceptable. Pontchartrain points out that FPT's engineer did inquire in November 1987 and was told the tower was objectionable because it was near visual flyways. Pontchartrain's arguments do not support a finding that FPT was not diligent. Each of the steps that Pontchartrain urges that FPT should have undertaken would not have expedited the FAA investigation and comment period, they would only have permitted FPT to make an independent judgment about the viability of its site. Moreover, FPT's engineer did make inquiries to the FAA about the investigation, as Pontchartrain points out. This is not an example of an applicant which did not pursue its tower proposal before the FAA. It may be, however, as Pontchartrain urges, an applicant which did not make the best judgments about where to locate its tower.

5. Pontchartrain claims that FPT could have foreseen the rejection of the tower site if it had sought expert advice. FPT hired a consulting engineer and there is no evidence that with a better engineer or aeronautical consultant Pontchartrain could have foreseen the result. Without some evidence to the contrary, it must be assumed that FPT's consultant did not foresee the rejection by the FAA of the proposed tower site. Granting FPT's petition to designate a new tower location will not disrupt the proceeding because the new location is acceptable to the FAA and satisfies the Commission's regulations. While it changes the comparative coverage evidence, FPT will have to be compared on the basis of its old coverage proposal. Good cause exists for granting the petition and accepting the amendment. With this change of tower site, the hazard to air navigation issue is resolved.

Issue 2: Comparison of the applications

Diversity of ownership of the media of mass communications

6. Pontchartrain and its principals have no mass media interests. Pontchartrain Exh. 7.

7. FPT has no mass media interests. FPT Exh. 3, at 1. Louis Jenkins, Jr. and his wife have promised to divest their connection with and interest in a low power television licensee, Great Oaks Broadcasting Corp., Inc. *Id.* Louis Jenkins holds, through his ownership of American Television, Inc., a contingent right to acquire an LPTV station in Atlanta, Georgia. *Id.* L. J. Thibodeaux and W. Kenneth Guillot, FPT limited partners, own Gill-Tibb Incorporated, which owns 10% of the class A voting stock of Great Oaks Broadcasting. Tr. 529; FPT Exh. 3, at 1. Great Oaks operates LPTV station W49AK at Baton Rouge, Louisiana. FPT Exh. 3, at 1.

Best practicable service

Participation in station operation by owners, quantitative and qualitative factors

8. *Pontchartrain* is a corporation which is authorized to issue voting and nonvoting stock. Voting shares have been subscribed by the persons who propose to participate in the station's operation. Pont. Exh. 1. The applicant does intend to sell non-voting shares. The current stock subscribers are Milo Neeha Beaver, Willie Grant Jackson, Ernest L. Deiparine, Keiko Iwasaki Niehaus, Paulina Rovira Kron. *Id.* Milo Beaver is president, Willie Jackson is first vice president, Ernest Deiparine is second vice president, and Keiko Niehaus is secretary/treasurer. *Id.* They are all directors and each has subscribed to 20% of the voting stock. Paulina Kron is not an officer or a director because she is an alien but she has subscribed to 20% of the voting shares.

9. The future non-voting stockholders do not have the right to "[c]ontrol the day to day management" of the corporation, "[c]ontrol the overall operation of management," and "[v]ote on any matter except as expressly required by law or for the approval or disapproval of matters which the Common Class A Voting Stockholders are limited from doing" by the Articles of Incorporation. FPT Exh. 12, at Article VI., B. 1-3. 66% of the non-voting shareholders must approve dissolution, merger, liquidation, or debt security "that may result in the transfer or cessation of a substantial portion" of the corporation's business, amendments to the articles to their detriment, extension of credit to secure any debt other than one of the applicant, or mortgaging of assets except to obtain the asset mortgaged. FPT Exh. 12, at Article V., B. 1-4. The voting shareholders do not know who will buy the non-voting shares or why such shares exist. Tr. 173, 259, 261, 361-364, 421, 425.

10. Pontchartrain was organized by the Hammond law firm Curet Curet. Ronald and Douglas Curet, lawyers in the firm, called four of the five stock subscribers to talk to them about applying for the station. Tr. 38, 40, 245, 313, 389. Mr. Beaver suggested Ms. Niehaus for the proposal and of the five subscribers they were the only ones who knew each other. Tr. 40, 249, 313, 394. Pontchartrain's principals stated that they were selected by the Curets because they were minority group members. Tr. 41-42, 247, 392. The Curets have assisted in preparing the application, the corporate documents, the financing (Tr. 186-88) but the applicant has never been charged for the law firm's services. Tr. 182. Keiko Niehaus, Ponchartrain's treasurer, did not know what the charge for the Curet's services would be, if any. Tr. 183. The Curet firm keeps the corporate minutes. Tr. 49. When Ms. Kron and Mr. Deiparine needed to borrow money to contribute to the applicant, Ronald Curet co-signed their loans. Tr. 350, 407. Ms. Niehaus also took out a bank loan for1,000 to meet her obligation. She said no one ever inquired about whether she could come up with 30,000. Tr. 189-90. Mr. Jackson and Mr. Dieparine also intend to borrow to make payment on their 30,000 obligations. Tr. 251, 391.

11. The bank which will lend Pontchartrain the funds needed for the station was not known to the treasurer, Ms. Niehaus, who said hesitantly she thought it was Fourth Security in Slidell. Tr. 187, 188. Mr. Jackson said it was the St. Tammany Parish Bank in Mandeville. Tr. 265. Ms. Kron said it was the St. Tammany Bank. Tr. 342. Ms. Niehaus was vague about how Pontchartrain obtained a loan letter of 5 million. She said Mr. Beaver obtained the letter but she believed it was only with Mr. Curet's help. Tr. 187. Mr. Jackson could not recall when the letter was obtained or when he saw it. Tr. 264. Ms. Kron was definite that she had no involvement in obtaining financing. Tr. 342. Mr. Deiparine was uncertain about how the letter was obtained, what the bank was, and when it was obtained. Tr. 411-18.

12. Milo Beaver proposes to work full time, 40 hours per week, as general manager of the station. Pont. Exh. 2, at 1. He will manage and direct all operations at the station, in part through department heads. *Id.* Mr. Beaver is a native American and he lives within the service area. *Id.* Mr. Beaver has lived in Ponchatoula, Louisiana since 1980, a community adjacent to Hammond which is within the proposed city grade signal. *Id.* From 1976 to 1980, he lived in Covington, Louisiana, which is within the proposed Grade A signal contour. *Id.* Mr. Beaver, who has been unemployed since 1987 (Tr. 136), is a respiratory therapist. Pont. Exh. 2, at 1-2. Since 1978, he has provided free natural healing services to members of the community in his home. *Id.* He belongs to the Louisiana Respiratory Therapy Association; for that organization he has provided blood pressure screenings and tests for lung disease. *Id.*, at 2. He has also taught CPR classes in the community. *Id.* Mr. Beaver belongs to the Ponchatoula Chamber of Commerce and has participated in civic activities involving children with respiratory problems. He has also helped raise money during a Sickle Cell Anemia telethon. *Id.*

13. Willie Grant Jackson proposes to work full time, 40 hours per week, as director of news and public affairs. Pont. Exh. 3, at 1. He will direct and supervise presentation of news and manage the production and direction of the public affairs programs. *Id.* Mr. Jackson maintained that the station would have news but he did not know how much. Tr. 269. Mr. Jackson has lived all of his life in Hammond. Pont. Exh. 3, at 1. He belongs to a local church, he tutors high school students several nights each week, he officiated at basketball games from 1980 to 1986, belongs to the NAACP, and to the Progressive Gent Civic Club. Pont. Exh. 3, at 2. Mr. Jackson is black.

14. Ernest N. Deiparine proposes to work full time, 40 hours per week, as the business manager. Pont. Exh. 4, at 1. He will act as the station's general manager if the general manager is away. *Id.* He will manage and direct

the station's budget, accounting, purchases, services, and personnel. *Id.* Mr. Deiparine has lived in Hammond since 1982. *Id.* He belongs to a local church and he has participated in fund raising for the learning disabled through his membership in Telephone Partners. *Id.* Mr. Deiparine is a Pacific Islander; he was born in the Philippine Islands. *Id.* Mr. Deiparine, who is 78 years old (Tr. 437), was unable to identify what services or equipment the station might purchase. Tr. 389.

15. Keiko Iwasaki Niehaus promises to work full time, 40 hours per week, as the program director. Pont. Exh. 5, at 1. She will manage and direct the acquisition, production and presentation of programs and develop the program schedule. *Id.* Miss Niehaus lives in Ponchatoula, which is within the proposed city grade signal and adjacent to Hammond. *Id.* She lived there from 1968 to 1972 and from 1976 to the present. *Id.* She is an Asian American. Ms. Niehaus has belonged to a Ponchatoula church since 1977, in which she has volunteered to work in the church nursery and teach Sunday school. *Id.* Since 1979, she has conducted free blood pressure screenings and answered health questions at the Hammond Health Fair. She has also worked for the Easter Seal organization during 1983 to 1985. Pont. Exh. 5, at 2. Ms. Niehaus works as a practical nurse but she will give up that position to work at the station. Pont. Exh. 5, at 1.

16. Paulina Rovira Kron promises to work full time, 40 hours per week, as general sales manager. Pont. Exh. 6, at 1. She will supervise the solicitation and sale of advertising time. *Id.* Ms. Kron also lives in Ponchatoula; she has resided there since 1970. *Id.* From 1973 to 1983, Ms. Kron performed volunteer services at Ponchatoula High School. *Id.* She belongs to a Ponchatoula church where she has participated in youth activities and collecting food for the poor. She has also helped poor people to obtain food and clothing. *Id.* Ms. Kron is an alien and Hispanic. *Id.*

17. *FPT* is a limited partnership with one general partner, Louis E. Jenkins, Jr., who owns 45% of the equity and four limited partners, L. J. Thibodeaux (5% equity), W. Kenneth Guillot (5% equity), J. Chandler Peterson (42.5% equity), and William Moxley (2.5% equity). FPT Exh. 1. Mr. Jenkins promises to work full time, 40 hours per week, as the general manager. FPT Exh. 4. He will supervise all departments and direct all financial matters at the station. Mr. Jenkins lives in Baton Rouge, which is within the city grade signal of the proposed station; he has lived there nearly all his life. FPT Exh. 5, at 1. He is a member of the state legislature, where he has been a member of a number of committees since 1972. *Id.* Mr. Jenkins is a member of the Baton Rouge Chamber of Commerce and a former member of the Baton Rouge Lions Club. FPT Exh. 5, at 2. He worked as newsperson at WLCS from 1964 to 1965, and as announcer at WAFB-TV from 1965 to 1966; currently he is manager of low power television station, W49AK, Baton Rouge. FPT Exh. 5, at 2-3.

18. Mr. Jenkins will not move to Hammond which is a 45 miles from his home in Baton Rogue. Tr. 508, 558-59. He believes he can drive that distance in 35 minutes. Tr. 611. He intends to continue his legislative job. When the legislature is in session (about 60 days over an 85 day period) he spends about 30 hours per week on legislature business. Tr. 551. He spends from 9:00 a.m. to 6:30 p.m at the capitol. Tr. 551-52. When the legislature is not in session he spends about 8 hours a week on legislature business. Tr. 555-56. His legislative work amounts to 400 hours per year. Tr. 556-57.

19. Mr. Jenkins, since 1984, has been chairman of the 60,000 member Friends of the Americas. Tr. 518-19. The organization conducts 46 projects in 22 different countries. FPT Exh. 5, at 2. Mr. Jenkins averages 10 hours per week on that organization and sometimes he spends several weeks at a time traveling for the organization. Tr. 518. Mr. Jenkins, since 1981, has also been a member of the Council for National Policy, which takes two days three times a year and occasional telephone calls and correspondence. Tr. 521, 522-23, 524. Mr. Jenkins also is chairman of Citizens for Louisiana, which is a lobbying organization; he spends two hours a month on activities for that organization. Tr. 525-26.

20. FPT's partnership agreement provides that the general partner will manage and operate the partnership. FPT Exh. 14, at 10. If the general partner leaves, 51% of the limited partnership; interests must approve the new general partner. *Id.* at 26. Limited partners are prohibited from taking part in the management and operation of the business, act as employees in any capacity which directly or indirectly relates to the media enterprises of the partnership. *Id.*, at 28. Limited partners may not act as independent contractors who do business with the partnership, communicate about the day-to-day operations with the general partner, perform any services relating to media activities, or remove the general partner except for cause. *Id.*, at 29. Mr. Jenkins has not made his capital contribution for which he is obligated under the partnership agreement. Tr. 532. Nor have the limited partners. Tr. 533. The partnership has paid its expenses with a loan from limited partner Mr. Peterson and he will provide any needed additional money for the licensing process. Tr. 447, 535-36. Mr. Peterson has also arranged for financing for construction and operation of the station. Tr. 446-47.

Comparative Coverage

21. The following data are based on the applicants' joint engineering exhibit, which was prepared on February 26, 1988, and received into evidence on March 28, 1988. The applicants propose to serve the following total areas and populations:

Applicant	Area (Sq. Kilometers)	Population
Pontchartrain	30,644	977,362
Florida Parishes	23,138	1,714,974

Neither applicant proposes any white area coverage, *i.e.*, service to an area not presently receiving any Grade B television service. As illustrated below, both applicants propose service to gray areas (areas receiving only one Grade B television service) and underserved area, (areas receiving two, three or four services):

	Applicant	Area (Sq. Kilometers)	Population
2d service	Pontchartrain	342	5,745
	Florida Parishes	311	4,598
3rd service	Pontchartrain	816	20,216
	Florida Parishes	642	18,879
4th service	Pontchartrain	4,866	71,996

	Florida Parishes	2,851	53,773
5th service	Pontchartrain	7,726	211,336
	Florida Parishes	3,377	156,355

CONCLUSIONS

Issue 1: FPT's tower proposal is not a hazard to air navigation

22. FPT was unable to demonstrate at the hearing that its site would not present a hazard to air navigation. FPT informed the Commission on the last day of the hearing that the FAA had indicated that its site would present a hazard to air navigation. Within a month following the close of the record, FPT petitioned for leave to amend to designate a tower site that the FAA had previously approved but on which no tower had been built. On May 4, 1988, the FAA approved FPT's tower proposal at its new site. That approval resolves any questions remaining about whether FPT's tower proposal would present a hazard to air navigation. Pontchartrain has urged various arguments against FPT's showing of good cause for leave to amend to designate a new tower site and those arguments have been considered and rejected at ¶¶ 3-5. FPT also moves to amend the coverage evidence to reflect the greater coverage from its new site. That request will be denied since the change in its site comes too late to improve its comparative standing. FPT's request to reopen the record will be denied.

Issue 2: The comparative proposals of the applicants

Diversity of ownership of the media of mass communications

23. Neither applicant holds interests in the mass media that are required to be weighed in comparing the proposals. FPT principal Louis Jenkins, Jr. and his wife have promised to divest their interest in and connection with the Baton Rouge LPTV station W49AK owned by Great Oaks Broadcasting Corp. While two of FPT's limited partners will retain their interests in Great Oaks Broadcasting Corp., the record reflects that they are not materially involved, directly or indirectly, in the management or operation of the media-related activities of FPT's partnership.

24. FPT's partnership agreement specifically prohibits its limited partners from managing or operating the partnership. They cannot, according to the partnership agreement, become employees in any capacity which relates directly or indirectly to the media enterprises of the partnership. The partnership agreement also prohibits limited partners from acting as independent contractors who do business with the partnership, they cannot communicate about day-to-day operations with the general partner, they may not perform any services for the partnership relating to media activities, and, except under limited circumstances, they cannot remove the general partner. These are the specific provisions that the Commission believes provide sufficient insulation of limited partners. *Forms*, Radio Reg. (P&F) 98:301-2-3 (1987).

25. Pontchartrain argues that the limited partners of FPT are not fully insulated because there is no provision in the partnership agreement which specifically provides the general partner a veto on the admission of new general partners. Ponchartrain points out that Louisiana law does not independently provide that right. The instructions to Form 301 provide that the general partner must be empowered to veto any admissions of additional general partners admitted by vote of the exempt limited partners. FPT argues that the Commission's requirement is not necessary with regard to its partnership since the partnership agreement does not give its limited partners the right to participate in the selection of additional new general partners. *See Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 Radio Reg. (P & F) 2d 604, 613 (1985). FPT points out that its partnership agreement does not provide for the appointment of additional general partners. It is also apparent that Louisiana law governing limited partnerships does not grant to limited partners that right if the partnership agreement does not. FPT Exh. 14, "Louisiana Statues Governing Limited Partnership."

26. Pontchartrain argues that FPT's limited partners are not bound by the agreement because none of the partners have made their initial capital contributions. Pontchartrain maintains that the capital contributions are conditions precedent to acquiring an interest in the partnership. *Citing, Houston Family Television, Ltd.*, 101 F.C.C. 2d 661, 668 (Rev. Bd. 1985). There the Review Board stated that timely binding agreements by owners to participate in the applicant are the minimum assurance an applicant must provide to the Commission if it is to consider the applicant's proposal. *Id.* FPT had a binding partnership agreement before it filed its application and the partners are bound by the agreement to make their capital contributions. FPT points out that it is the binding nature of the obligation to pay that is important in judging the *bona fides* of an applicant, not whether the obligation has been met. Because FPT's partnership agreement was timely and is binding on the partners, there is no justification for concluding that the FPT partners have not yet decided whether they will become partners. FPT is entitled to be considered a limited partnership where the limited partners are properly insulated.

27. Ponchartrain also urges that Louis Jenkins' contingent right to obtain a LPTV system in Atlanta should be counted against FPT. Generally, the Commission considers only those interests which are held by the applicant or its principals. Pontchartrain has not shown authority for applying any other standard here.

Integration of ownership and management

28. All of the voting stockholders in Pontchartrain propose to occupy management positions and work at the station full time, 40 hours per week. FPT argues that the stock subscribers in Pontchartrain are not entitled to be considered owners for the following reasons: FPT argues that Paulina Kron, who is an alien, was listed as an officer and director and in the articles of incorporation which were in existence at the time the application was filed. FPT urges that, because the Pontchartrain application was amended to reflect that Ms. Kron was no longer an officer and director, that change must be found to be "a device to circumvent Commission restrictions." FPT claims that Ponchartrain's failure to simultaneously amend the corporate documents to coincide with its amended Commission application was "sleight-of-hand." Pontchartrain responds by pointing out that Ms. Kron was initially elected a director and secretary in 1986 and before the application was filed the board of Pontchartrain replaced her. Tr. 110, 127-28. FPT fails to provide any factual or legal

authority for its argument that Pontchartrain should be disqualified for changing the secretary and director status of Ms. Kron and later altering the corporate documents to reflect that change.

29. FPT also argues that Pontchartrain should be disqualified because it intends to issue non-voting stock. In addition, FPT argues that Ponchartrain's local legal counsel, Ronald Curet, has exhibited so much interest in his clients and their application that the Commission should view him as having an interest. Neither of these claims diminishes Pontchartrain's proposal. Non-voting stock, when it is issued, will not alter control in Pontchartrain and there is no evidence that Ronald Curet is a real party in interest. FPT did not request designation of an issue to examine that claim. FPT also argues that because Pontchartrain stockholder Willie Grant Jackson has indicated he wants to retire from his teaching position, he will not perform the duties he promised. The presiding officer observed Mr. Jackson and what he said was that he was eligible to retire and that he would do so to work at the station. Mr. Jackson is 50 years old. Pont. Exh. 3. FPT argues that Ernest M. Deiparine, who is already retired and 78 years old, cannot be expected to work at the station because of his age. Mr. Deiparine appeared to the presiding officer to be as alert and able as any of the witnesses in this proceeding. The Commission has no age requirement.

30. FPT also asserts a series of arguments in which it claims that Pontchartrain's principals lack the necessary experience and will, therefore, fail in their operation of the station. That argument is conjectural and unsupported by any Commission policy or rule.

31. Milo Beaver proposes to work full time, 40 hours per week, as the general manager of Pontchartrain's station. Mr. Beaver has lived within the service area of the proposed station since 1976. He lives in the adjacent community of Ponchatoula, Louisiana where he has been active in community activities. Mr. Beaver is a native American. Willie Grant Jackson proposes to work full time, 40 hours per week, as director of news and public affairs. He has lived all his life in Hammond where he has been active in community affairs. Mr. Jackson is black. Ernest N. Deiparine proposes to work full time, 40 hours per week, as the business manager. Mr. Deiparine has lived in Hammond since 1982 and during that time he has participated in community activities. Mr. Deiparine is a Pacific Islander. Keiko Iwasake Niehaus proposes to work full time, 40 hours per week, as the program director. She lives in Ponchatoula which is adjacent to Hammond; that has been her home since 1968 except for the years 1972 to 1976. She has participated in community activities. Ms. Niehaus is an Asian American and a woman. Paulina Rovira Kron promises to work full time, 40 hours per week, as the general sales manager. She has lived in Pontchatoula since 1970 and she has participated in community activities. Ms. Kron is Hispanic and a woman. All of Ponchartrain's principals will quit their current jobs to work at the station.

32. FPT proposes that its only general partner, Louis E. Jenkins, Jr. will work full time, 40 hours per week, as the station's general manager. Mr. Jenkins will live in Baton Rouge, where he has lived nearly all of his life; Baton Rouge is 45 miles from Hammond. While Mr. Jenkins claims he will spend full time at the station, it is evident that that will be difficult throughout the year. He is a member of the state legislature and many legislative committees. The legislature meets 60 days a year, over an 85 day period. Those activities begin at 9 in the morning and continue until 6:30 at night. Even when the legislature is not in session, Mr. Jenkins spends eight hours a week on legislative business. The station will be 45 miles from Baton Rouge and it is not credible that, during the nearly three months that the legislature is in session, that Mr. Jenkins will be available full time on a day-to-day basis to manage the station. Mr. Jenkins also spends, as chairman of the 60,000 member Friends of the Americas, 10 hours a week on the organization's activities. Friends of the Americas organization conducts 46 projects in 22 different countries and Mr. Jenkins sometimes spends several weeks at a time traveling for the organization. He is also active in several national or statewide groups. When these activities are added to his legislative job and the distance he lives from Hammond, it is apparent that Mr. Jenkins will not spend 40 hours per week at the station on a day-to-day basis.

33. FPT's qualitative proposal is enhanced by Mr. Jenkins political activities and his longtime residence in Baton Rouge. He also has a number of years of radio and television work experience, including management.

34. When Pontchartrain and FPT's applications are compared on their integration proposals, Pontchartrain is quantitatively and qualitatively better. Pontchartrain's principals will work full time at the station without other jobs. FPT's only principal, Louis Jenkins, will be occupied for a number of months during the year with his legislative position at his home in Baton Rouge. While Pontchartrain is to be preferred for its full-time commitment to the station's management, it is also to be preferred because its principals live in the community of Hammond, or in the adjacent community of Ponchatoula. They have participated directly in the activities of Hammond and its immediate area. Mr. Jenkins, on the other hand, lives in Baton Rouge and his activities are centered there. Mr. Jenkins, however, does have broadcast experience. But all of Pontchartrain's principals are minorities and two principals are minorities and women. Mr. Jenkins' broadcast experience does not outweigh Pontchartrain's direct connection to Hammond and the minority and female status of Pontchartrain's principals. If FPT's integration proposal could be credited as one for full-time operation by its principal on a day-to- day basis, Pontchartrain would still prevail because of its superior qualitative integration proposal.

Comparative coverage

35. FPT will serve 737,612 more people (75.46%) than Pontchartrain, although Pontchartrain's Grade B signal will cover a 24.5% greater area. Thus, FPT's Grade B coverage superiority is substantial. Moreover, this superior coverage involves a second service to 4,598 persons and coverage to other underserved areas encompassing 229,007 persons. Although Pontchartrain will serve a much lower overall population, it will also provide significant coverage to gray and underserved areas. Specifically, Pontchartrain will provide a second service to 5,745 persons, or 1,147 more than FPT, and coverage to underserved areas encompassing 303,548 persons, or 74,541 more than FPT.

36. The Commission has awarded slight preferences to applicants providing substantially greater overall coverage even where the additional area to be served is already well-served by five or more existing services. Thus, FPT receives a slight preference for its substantial overall coverage advantage. FPT's coverage of gray areas with 4,598

persons increases its coverage preference to a moderate one, but not substantial because of the relatively small number of persons receiving a second television service, the fact that no white areas will be covered, and Pontchartrain's greater overall area coverage. *Christian Broadcasting of the Midlands, Inc.*, 57 Rad. Reg (P&F) 2d 87, 91 (Rev. Bd. 1984). *See Communications Properties, Inc.*, 92 F.C.C. 2d 45 (Rev. Bd. 1982); *Town and Country Radio, Inc.*, 70 F.C.C. 2d 572 (Rev. Bd. 1978).

37. However, Pontchartrain proposes gray area coverage to 1,147 more people than FPT, and underserved coverage to 74,541 more people. Thus, these quantitative advantages warrant a moderate preference for Pontchartrain. *Christian Broadcasting, supra* (slight preference for 45,468 more people in underserved areas); *Communications Properties, supra* (moderate preference for second service to 4,456 persons).

38. FPT deserves a moderate preference for its much greater overall population coverage, which encompasses some gray and underserved areas. Pontchartrain deserves a moderate preference for its greater gray and underserved area coverage. On balance, the coverage proposals of Pontchartrain and FPT are equally preferable, and neither applicant is entitled to a comparative coverage preference.

39. FPT and Pontchartrain are both qualified and equal on all comparative factors except integration. Pontchartrain's quantitative and qualitative integration proposal is to be preferred over FPT's proposal for reasons already stated.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed April 26, 1988 by Louis E. Jenkins, Jr., d/b/a Florida Parishes Television, Ltd. Partnership in Commendam IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the request for acceptance of late- filed notice of publication, filed March 25, 1988 by Louis E. Jenkins, Jr. d/b/a Florida Parishes Television, Ltd., Partnership in Commendam IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed November 10, 1988 by Louis E. Jenkins, Jr. d/b/a Florida Parishes Television, Ltd., Partnership in Commendam IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion to reopen the record and admit evidence, filed May 20, 1988 by Louis E. Jenkins, Jr. d/b/a Florida Parishes Television, Ltd., Partnership in Commendam IS DENIED.

IT IS FURTHER ORDERED that the application of Louis E. Jenkins, Jr., d/b/a Florida Parishes Television, Ltd., Partnership in Commendam (File No. BPCT-870421KI) IS DENIED and the application of Pontchartrain Broadcasting Company, Inc. (File No. BPCT-870330KT) for a construction permit for a new commercial television station to operate on Channel 62, Hammond, Louisiana IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-140

In re Applications of

CATHERINE JUANITA HENRY	File No. BPH-831118AP
HARBOR COMMUNICATIONS, A California Limited Partnership	File No. BPH-840725IB
EARNEL DURDEN and UNE DURDEN d/b/a DURDEN BROADCASTING CO.	File No. BPH-840727ID
SIMPSON COMMUNICATIONS LTD., A Limited Partnership	File No. BPH-840727IG
ECHEVERRIA BROADCASTING CORPORATION	File No. BPH-840727IJ
AMIGOS DE SAN DIEGO, A California Limited Partnership	File No. BPH-840727IM
REPRESENTATIVE MEDIA LIMITED PARTNERSHIP	File No. BPH-840727IP
TRIPLE BOGEY BROADCASTING, A California Limited Partnership	File No. BPH-840727IT
NEW SOUNDS OF SAN DIEGO, INC.	File No. BPH-840727IU
SAN DIEGO BROADCASTING, A California Limited Partnership	File No. BPH-840727IV
AMERICAN MEDIA GROUP, A Limited Partnership	File No. BPH-840727IW
SAN YSIDRO COMMUNICATIONS, A Limited Partnership	File No. BPH-840727IY
SAN DIEGO COMTRENDS, INC.	File No. BPH-840727JD
VISTA GRANDE BROADCASTING, A California Limited Partnership	File No. BPH-840727JI
DIANE OSEQUERA	File No. BPH-840727JJ
SOLEDAD BROADCASTING COMPANY	File No. BPH-840727JK
MARIA ELENA LASO BRADLEY	File No. BPH-840727JL

For Construction Permit for a
New FM Station San Diego, California

ORDER

Adopted: November 9, 1988; Released: November 25, 1988

By the Review Board:

1. Before the Board is a Joint Petition for Approval of Agreement filed October 27, 1988, proposing a universal settlement of the captioned proceeding. [1] However, there are certain deficiencies in the Petition and related documents which must be corrected before a final *Order* may be issued.

2. First, Section 1.52 of the Commission's Rules, *Subscription and Verification*, 47 C.F.R. §1.52, requires that "all petitions . . . filed by any party represented by counsel, shall be signed by at least one attorney of record in his individual name . . . ." *See Northampton Media Associates* (FCC 88I-112), released October 28, 1988. It appears that only counsel for Triple Bogey Broadcasting and San Diego Broadcasting have properly executed the Joint Petition.

3. Second, the various agreements between Triple Bogey Broadcasting and (a) Durden Broadcasting Co., (b) Vista Grande Broadcasting; (c) San Diego Broadcasting, and (d) San Ysidro Communications are all undated. [2]

4. Third, the copy of the agreement with Diane Osequerra appears to contain pages of the agreement with Soledad Broadcasting Company. True and correct copies of both these agreements should be submitted.

5. Fourth, with respect to the affidavits/declarations submitted with the Joint Petition pursuant to Section 73.3525(a)(1) of the Commission's Rules, 47 C.F.R. §73.3525(a)(1), the parties have not filed a copy of an executed affidavit from Durden Broadcasting Co., and the affidavit of Diane Osequerra is not notarized. Additionally, the affidavit of Triple Bogey Broadcasting does not

identify the title or capacity of Bruce Walton for executing that affidavit. The same deficiency is noted with respect to Echeverria Broadcasting Corporation and Ben Echeverria.

6. Fifth, the parties shall promptly notify the Board of the occurance of the styled "condition subsequent" (Joint Petition, pg. 2) concerning the issuance of the specified "letters of credit."

7. ACCORDINGLY, IT IS ORDERED, That the parties SHALL FILE an appropriate amendment to their pending Joint Petition for Approval of Agreement curing the defects and furnishing the requested information noted herein within seven (7) days of the release date of this Order [3]; and,

8. IT IS FURTHER ORDERED, That the motion for extension of time filed November 7, 1988, by the Reginald A. Fessenden Educational Fund, Inc. and the comments and request for clarification filed November 7, 1988, by AFC Broadcasting, Inc. ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Also before the Board are (1) a motion for extension of time to file a response to the Joint Petition, filed November 7, 1988 by Reginald A. Fessenden Educational Fund, Inc. (Fessenden) and (2) Comments and Requests for Clarification, filed by AFC Broadcasting, Inc. on November 7, 1988. Both requests will be dismissed. With respect to Fessenden, the predicate for its request (*i. e.*, to respond to the settlement agreement) does not support the grant of an extension of time since Fessenden is neither a party nor seeking party status and, thus, lacks standing to challenge the pending settlement agreement. *Cf. William L. Zawila*, FCC 88R-57, released October 26, 1988. AFC, the interim operator of the facility at issue, requests clarification of its rights relative to the transfer of operations of KIFM to the surviving applicant in this proceeding. Operational implementation of the transfer of this facility is a matter beyond the authority of the Board, and more appropriately should be directed to the pertinent Commission operating Bureau.

[2] Our principal concern with the dates relates to the timing requirements of Section 73.3525(a) of the Commission's Rules, 47 C.F.R. §73.3525(a).

[3] So as not to unnecessarily delay review of the proposed settlement, the Board has provided advance copies of this *Order* to the parties prior to release of the final printed FCC Record copy.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-530

In re Applications of

RHYS G. MUSSMAN File No. 48846-CL-P-183-A-86
d/b/a Dial 1 Mobile

For authority to construct and
operate a Domestic Public Cellular
Radio Telecommunications System on
Frequency Block A in the
Asheville, North Carolina MSA; and

RHYS G. MUSSMAN File No. 71251-CL-P-302-A-86
d/b/a Dial 1 Mobile

For authority to construct and
operate a Domestic Public Cellular
Radio Telecommunications System on
Frequency Block A in the
Enid, Oklahoma MSA.

HEARING DESIGNATION ORDER

Adopted November 1, 1988; Released November 28, 1988

By the Deputy Chief, Common Carrier Bureau:

PRELIMINARY MATTERS

1. Under consideration are issues involving the above-captioned applications, filed by Rhys G. Mussman d/b/a Dial 1 Mobile (Mussman). Mussman won cellular radio lotteries in the Asheville, North Carolina Metropolitan Statistical Area (Asheville MSA) and the Enid, Oklahoma MSA (Enid MSA) and has been designated as the tentative selectee in both markets. Petitions to dismiss or deny were filed against Mussman's applications in each market. In Asheville, the EDM Settlement Group (EDM Group) filed a Petition to Deny on behalf of BC Cellular (BC), the number two selectee in the lottery.[1] In Enid, J & J Celcom (J & J), the number eight selectee, filed a Petition to Dismiss or Deny.[2] Mussman filed oppositions to both petitions. EDM Group filed a response to the opposition in Asheville and Mussman filed a Motion to Strike the response.

2. EDM Group and J & J allege various defects in Mussman's applications that are addressed below. In the Asheville MSA, EDM Group in its response to Mussman's opposition also raises character qualification issues regarding Mussman. Even though this pleading is untimely, [3] because of the nature of the charges, we will consider the issues raised therein. The circumstances giving rise to them are a matter of public record. The character qualification issues are raised by Mussman's representations with respect to Rhys G. Mussman d/b/a Northwestern Indiana Cablevision and Mussman's failure to comply with effective Commission orders concerning that company and its successor, Northwest Indiana CATV, Inc. d/b/a Northwestern Indiana Cablevision (Northwest). These issues raise substantial and material questions relevant to the qualifications of Mussman to be a Commission cellular licensee, and therefore, we are designating them for hearing.

3. Because Mussman is the sole owner of the applicant of the captioned Asheville and Enid MSA applications, the character qualification issues raised are common to both markets, and therefore, a consolidated hearing on the two applications is being specified.[4] Consolidation of the applications into one proceeding will eliminate the need to adduce identical evidence in separate hearings.

BACKGROUND

4. On October 12, 1983, a complaint was filed by Comark Cable Fund III (Comark) pursuant to Section 208 of the Communications Act (the Act) against Northwestern Indiana Telephone Company (NITCO) and Rhys Mussman d/b/a Northwestern Indiana CableVision, Northwest's predecessor. In *Comark Cable Fund III*, 100 FCC 2d 1244 (1985) (*Order*), the Commission found that NITCO and Northwest (defendants) were affiliated companies engaged in discriminatory and anticompetitive conduct in violation of the Act and the Commission's rules concerning telephone/cable television cross-ownership. Specifically, it found that NITCO was constructing cable television systems within its telephone service area in Hebron, De Motte and Lake of the Four Seasons, Indiana without Commission authorization and operating one of them in continuing violation of Section 63.54 of the rules and Section 214 of the Act. The Commission directed that the unauthorized cable television system facilities be divested and notified NITCO of an apparent liability for a monetary forfeiture of 20,000. The Commission further ordered NITCO and Northwest to undertake good faith efforts to negotiate a settlement of Comark's claims for damages.

5. NITCO filed a petition for reconsideration of the *Order*, which was denied. *CCI Cablevision*, 103 FCC 2d 600 (1985) (*Reconsideration Order*). In that order, the Commission also confirmed that the divestiture requirement applied to Mussman and Northwest as well as NITCO. 103 FCC 2d at 610-11. Pending NITCO's appeal[5] of the Commission's *Reconsideration Order* and a request to the U. S. Court of Appeals for the District of Columbia Circuit (the court) for stay of the *Order*, the Commission temporarily stayed the effectiveness of the *Order* until seven days after the court's determination of the motion for stay before it. *Comark Cable Fund III*, 104 FCC 2d 451 (1985). The court refused to issue a stay[6] of the Commission's three *Orders*,[7] and the Commission's temporary stay order automatically terminated.[8] Defendants apparently have not complied with the Commission's outstanding orders (to carry out divestiture or enter into the trust arrangement) even though their motion for stay was denied by the court and the Commission's stay order terminated. The court subsequently remanded the proceeding, seeking further explanation of the "carrier/user" exemption from the cable/telco cross-ownership rule.[9] The Commission has clarified the issues that the court remanded and has reaffirmed its findings and conclusions in its

Orders, as clarified. *Comark Cable Fund III d / b / a CCI Cablevision*, 3 FCC Rcd 3096 (1988) *appeal docketed*, No. 88-1521 (D.C. Cir. July 22, 1988) (*Order on Remand*). No further stays have been granted.

CONTENTIONS OF THE PARTIES

Asheville

6. EDM Group asserts that Mussman's application contains three violations of the Commission's "letter perfect standard." First, EDM Group contends that Mussman failed to provide a cover page with the name, market and frequency block applied for in the microfiche copies of its application in accordance with Section 22.913 (b)(2) of the Commission's rules. Second, EDM Group contends that Mussman's proposed system contains an impermissible extension of the 39 dBu contour for cell number 2 beyond the Asheville MSA boundary. There is neither an adequate explanation for the extension nor a request for waiver of the Commission's rules, according to EDM Group. It further asserts that the extension is not *de minimis*, because 19% of the total coverage of cell 2 extends beyond the MSA, and it covers part of a major highway in a non-MSA area. Third, EDM Group contends that the tower sketches for cell numbers 1 and 2 depict only one antenna, but that each cell actually requires three antennas. Consequently, argues EDM Group, Mussman has underestimated the cost of its system and the amount of the financial commitment is insufficient.

7. Mussman responds that the paper copy of his application contains a cover page which includes a label providing all the information required under the "letter perfect" standard. With regard to the microfiche copies, Mussman asserts that he also complied with the requirements of Section 22.913 (c). He argues that EDM Group's complaint that he did not microfiche the stiff cover of the application is an attempt to create a Commission requirement that does not exist. Regarding the extension of the 39 dBu contour, Mussman asserts that he was not required to provide an explanation for what he characterized as a minor overlap into a non-MSA area. Nevertheless, he refers to Exhibit 3 of his application which indicates that the overlap was necessary to provide service to all important MSA areas and for efficient handoff between cells. Mussman also submits that this exhibit explains that a directional antenna will be used to minimize the contour overlap, while directing maximum power toward Asheville and minimum power toward the county outside the MSA. Mussman further states that the extension is the result of natural terrain configurations and necessary to provide reliable service to the eastern part of the Asheville MSA. Regarding the antenna sketches, Mussman responds that the sketches are correct, because each cell can be constructed with one antenna incorporating combiners and duplexers. Estimated costs are based on a system with ten voice channels in cell 1 and three voice channels in cell 2. Thus, Mussman contends that since he is not required to provide details of the antenna configuration, he could construct multiple antennas without amending his financial proposal. Mussman also provides an affidavit of Mitsubishi Electric America, Inc. (MEA) which confirms the commitment of funds for the purchase of equipment, including all antennas necessary for operation.

8. In its response to the opposition of the Asheville application, EDM Group cites the Commission's conclusions in the *Orders* as evidence that Mussman omitted a truthful response to Form 401, Item 15 of the Asheville application.[10] EDM Group maintains that the relationships between Mussman, his father Robert Mussman, NITCO, and Northwest, were found by the Commission to violate Section 63.54 of the rules. *Reconsideration Order*, *supra*, 103 FCC 2d at 601, 602-603. EDM Group argues that this omission is ground for dismissal of Mussman's application.

9. In its Motion to Strike, Mussman asserts that substantive consideration of EDM Group's pleading is precluded because it raises new matters that were not addressed in Mussman's opposition and thus is in violation of Section 1.45 (b) of the rules. Further, Mussman contends that his qualifications to be a Commission licensee are not impaired by the Commission's *Orders*. Mussman asserts the "No" response to Item 15 on the Form 401 was truthful. Mussman maintains that he has never been adjudged guilty by any court of unlawfully monopolizing or attempting unlawfully to monopolize radio communications. He also asserts that as selectee, he is not controlled by any other person or entity and thus is not controlled by any person or entity adjudged in these same matters. He also argues, through reference to Item 17 of Form 401[11] of the Asheville application, that he is not a party to the pending proceedings in regard to the matters identified in Item 15. Furthermore, Mussman contends that the Commission's *Orders* do not address issues of unfair competition and, thus, his participation in the appeal of those orders does not require a positive response to Item 17. He contends that the Commission's *Orders* were directed specifically against NITCO and that he did not at the time, and does not now, hold any ownership interest in the telephone company. Mussman insists that EDM Group incorrectly concludes that the Commission found an affiliate company guilty of anticompetitive practices in these proceedings. Moreover, according to Mussman, even if the Commission found the telephone company guilty of having engaged in anticompetitive practices, use of this fact in the instant cellular proceeding is precluded by Section 504(c) of the Act.[12] Mussman says that the case was then pending in the court and that defendants have not paid the forfeiture ordered by the Commission. Mussman requests that if the Bureau still questions his qualifications, he be granted leave to make further showings concerning his qualifications and to refute EDM Group's allegations in what was characterized as an unauthorized response.

Enid

10. J & J contends that Mussman's application should be dismissed because it does not have reasonable assurance of site availability in accordance with Section 22.15(a)(1) of the rules. J & J asserts that Mussman indicates in Item 35 of the Form 401 of his application that he proposes to use an existing structure occupied by AM radio Station KCRC, the location of which is specified in Item 27. J & J attaches the affidavits of the general manager and the chief engineer of the station, stating that no one contacted them concerning the use of the station's towers for a cellular system and that they have not given assurance of availability of the towers. J & J argues therefore that the certification as to site availability in Item 34 is incorrect and consequently, that the certification required by Section 22.913 (b)(3) of the rules is also incorrect. J & J also alleges that Mussman lacks a firm

financial commitment and fails to comply with Section 22.917 (b) of the rules because the letter from MEA and ASTRONET does not firmly commit MEA to provide the289,000 estimated for first year operations. J & J refers to the terms of the letter stating that the working capital loan for first year operations shall not exceed 311,000 or 30% of the total equipment and construction cost, whichever amount is less. J & J argues that if the actual costs for equipment and construction are 960,000 or less, the commitment would be for 30% of these costs, resulting in less than needed for first year operations.

11. Mussman submits two affidavits in response to J & J's allegation of lack of site availability. The first from Thomas G. Adcock, consulting engineer, states that the general manager and chief engineer of the radio station that owns the site for the proposed cell were not contacted concerning use of the station's tower. In the second affidavit, an owner of KCRC states that he told the representatives of the applicant that his company would be willing to negotiate a lease for cellular antenna space on the tower and that he did not discuss this arrangement with the two employees of the station. Mussman therefore argues he had reasonable assurances of site availability when he filed his application. With respect to the financing of the application, Mussman argues that identical letters from MEA have been approved by the Commission as demonstrating a firm financial commitment. Also submitted is an affidavit from the president of ASTRONET stating that a sufficient working capital loan will be made when the construction permit is received and the turnkey system is purchased.

DISCUSSION

12. We are not persuaded that Mussman's responses to Items 15 and 17 of Form 401 of the Ashville application raise an issue of misrepresentation as EDM Group contends. The "No" responses to those items appear appropriate in that it has not been shown that any court has finally adjudged Mussman, or any person directly or indirectly controlling him, guilty of any unfair method of competition. However, we conclude that failure of Northwest and Mussman, its predecessor and sole officer, director and stockholder, to divest or place in trust cable television facilities the Commission found had been unlawfully constructed, in contravention of effective Commission orders, does constitute a sufficient basis for concern over the applicant's future truthfulness and reliability. The Commission has found that violations of Commission orders should be treated as possibly predictive of future conduct, *Character Qualifications*, 102 FCC 2d 1179, 1209, 1210, *on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Ass'n of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987)[13] and that violations of outstanding Commission orders have a potential bearing on character qualifications. *Id.* at 1209. We also note that while there should be no non-rebuttable presumption that Mussman's prior failure to comply with Commission orders is necessarily predictive of his operation of the two proposed cellular radio systems, some behavior may be considered so fundamental to a licensee's operation that it is relevant to the qualifications to hold any Commission license. *Id.* at 1223. Since this is a question of fact to be resolved on a case-by-case basis, *see id.* at 1223-1224, Mussman's continuing noncompliance with outstanding Commission orders is thus a relevant consideration in determining from the hearing whether he possesses the requisite qualifications to hold cellular radio licenses in the Asheville and Enid MSAs.[14]

13. In determining the weight to be accorded to any particular acts of misconduct the Commission has stated the evidence should focus on three factors. These include the willfulness of the misconduct, the frequency of such behavior, and its currency. *Id.* at 1227. The Commission has also suggested additional factors to be considered including the seriousness of the misconduct, the nature of the participation, and the efforts to remedy the wrong. *Id.* at 1228. Mussman's apparent noncompliance with Commission *Orders* for divestiture or an interim trust pending appeal should be addressed under these standards.[15]

14. In spite of Mussman's assertions that he is not a party to the *Comark Cable Fund III* proceedings, we take notice that the record in those proceedings shows that the Commission determined that much of the misconduct addressed was attributable to Mussman. *See Comark Cable Fund III*, *supra*, 104 FCC 2d at 458. Mussman, through NITCO and Northwest, was directly involved in the rule violations found by the Commission.[16] In the *Reconsideration Order*, *supra*, 103 FCC 2d at 611, the Commission determined that the order of divestiture applied to Mussman personally as well as to NITCO. *See also Comark Cable Fund III*, *supra*, 104 FCC 2d at 453.

15. We conclude, however, that other issues raised by the petitioners should not be designated for hearing because the allegations either do not state a prima facie case, which if proven true could justify denial of the applications, or do not raise a substantial and material question of fact requiring a hearing. First, we find that Mussman's microfiche copies are clearly labeled on the top with the information required on the cover of the application, and thus, comply with with Section 22.913 (c) of the rules. *See* Section 22.913 (b)(2) of the rules; *Public Notice*, Report No. CL-86-89, released March 11, 1986. The requirement that the microfiche must be copies of the application focused on " *all* of the information contained in the original application" and did not require that the cover must be copied. *Public Notice*, *supra*. Thus, we find that Mussman's microfiche meet the Commission's "letter perfect" standard.

16. As for the 39 dBu contour extension of proposed cell number 2 in the Asheville market, the Commission requires that the 39 dBu contours be contained entirely within the MSA or New England County Metropolitan Area [NECMA] but that extensions of such contours beyond the MSA or NECMA into an area which is not a central or secondary MSA or NECMA do not render an application defective as long as the extension is determined to be *de minimis*. In providing guidelines as to what will be considered *de minimis*, the Commission has said that contour extensions may likely be permitted if they are designed to avoid interference conflicts with cellular service in adjacent areas, demonstrate a strong public interest consideration, and generally are minor in size in comparison to the total size of the proposed CGSA and to the size of the adjacent cellular service area that they overlap. *See Application Filing Procedures*, 51 Rad. Reg. 2d (P&F) 143 (1982). *See also Procedures Update*, 52 Rad. Reg. 2d (P&F) 725 (1982), *aff'd.*, *Cellular Radio Service*, 56 Rad. Reg. 2d (P&F) 1583 (1984). First, we note that Mussman has directionalized the antenna for cell 2, and attempted to minimize the effective radiated power (ERP) along the 90 degree radial outside the MSA. We also find that this

cell has been located to provide service and efficient handoff between the proposed cells in a mountainous area of the MSA. Regarding size of the extension, although the area of the extension is approximately 19.0% of cell 2, which is more than some *de minimis* extensions we have previously found acceptable,[17] an analysis by the Mobile Services Division staff indicates that the extension area constitutes approximately 1% of the area of the proposed CGSA and 1.2% of the Rural Service Area with which it overlaps.[18] Although the 19% extension may state a *prima facie* case, given all of these factors, we conclude that the extension is *de miminis* and permissible, and therefore no substantial and material questions of fact requiring a hearing have been raised.

17. Regarding the antenna sketches in the Asheville market, while a *prima facie* case of lack of financial qualifications may have been made, we find that the combiner/duplexer equipment which Mussman proposes to use allows single antennas to be used which can accommodate the number of channels proposed for each cell. Consequently, EDM Group's allegations concerning underestimated costs and lack of a firm financial commitment do not raise a substantial and material question of fact requiring a hearing.

18. J & J's allegations regarding site availability do state a *prima facie* case under Section 309 of the Act. However, based on the evidence submitted by Mussman showing that an owner of the Enid station had given assurance of site availability, we conclude that Mussman had reasonable assurance that the site would be available at the time he filed his application, and that, therefore, no substantial and material questions of fact requiring a hearing exist. In addition, we reject J & J's argument that there is no firm financial commitment due to a potential shortfall in the amount of the loan to cover the costs of first year operations. The equipment and construction costs for Mussman's Enid cellular proposal are estimated to be1, 035,868; and with estimated operating expenses of 289,000, the total funding required is1,324,868. MEA has explicitly committed to lend 1,035,868 in costs for installing the proposed system and has also committed to lend up to an additional311,000 in first year operations costs. These two figures total1,346,868, which is sufficient to cover the total estimated costs (1,324,868). *See Cagal Cellular Communications Corporation*, 2 FCC Rcd 4270 (1987). On the basis of these facts and in the absence of conflicting evidence, J & J's speculative allegation is insufficient to state a *prima facie* case requiring dismissal of the application or designation for hearing.

ORDERING PARAGRAPHS

19. Accordingly, IT IS ORDERED that the captioned applications ARE DESIGNATED FOR HEARING pursuant to Section 309(e) of the Communications Act of 1934, as amended, upon the following issues:

(1) to determine whether Rhys G. Mussman failed to comply with an outstanding Commission order, *CCI Cablevision*, 103 FCC 2d 600 (1985), when he failed to promptly divest himself of Northwest or to place Northwest in trust following the court order denying the stay;

(2) to determine in light of the evidence adduced under the foregoing issue and matters of public record that are subject to official notice whether Mussman possesses the requisite character qualifications to be a cellular radio licensee of the Commission; and

(3) to determine whether grant of the subject cellular radio applications would be in the public interest, convenience and necessity.

20. IT IS FURTHER ORDERED that the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

21. IT IS FURTHER ORDERED that pursuant to Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, the selectee in both the Asheville, North Carolina and Enid, Oklahoma MSAs.

22. IT IS FURTHER ORDERED that Rhys G. Mussman, BC Cellular and the Chief, Common Carrier Bureau, are made parties to this proceeding.

23. IT IS FURTHER ORDERED that the Petitions to Dismiss or Deny filed by EDM Settlement Group in the Ashville MSA and by J & J Celcom in the Enid MSA against the applications of Rhys G. Mussman d/b/a Dial 1 Mobile, File Nos. 48846-CL-P-183-A-86 and 71251-CL-P-302-A-86 respectively, are denied to the extent indicated herein.

24. IT IS FURTHER ORDERED that the applicant may avail himself of an opportunity to be heard by filing with the Commission, pursuant to Section 1.221 (c) of the rules, within 20 days of the release date hereof, a written notice stating his intention to appear for hearing and present evidence on the issues specified in this Designation Order.

25. This order is issued pursuant to authority delegated in Section 0.291 of the Commission's rules and is effective on its release date. The filing of any petition for reconsideration or application for review is governed by Sections 1.106 and 1.115 of the Commission's rules, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] The petition indicates that BC joined EDM Group through its agent, Early D. Monroe, Jr.

[2] J & J has voluntarily withdrawn its petition in the Enid MSA.

[3] EDM's responsive pleading was filed late because it was after Mussman's reply to the petition to deny. Section 1.823 states that a consolidated reply to a petition to deny may be filed, but no additional responsive pleadings will be accepted. Public Notice, Report No. CL-87-163A, released February 11, 1987, cautions applicants that no additional responsive pleadings will be accepted.

[4] Even though the petition to deny Mussman's Enid MSA application was withdrawn by J & J, the issues raised therein cannot be ignored and the merits of J & J 's petition will be

evaluated. *See, e.g.*, Cinkutis, Inc. 2 FCC Rcd 6384 (1987), Rodney A. McDaniel, 2 FCC Rcd 5402 (1987). *See also*, Christina Communications,2 FCC Rcd 1971 (1987).

[5] Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir., filed August 29, 1985).

[6] Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir. July 11, 1986) (*per curiam*).

[7] All three Commission orders related to the Comark Cable Fund III proceeding are hereinafter referred to collectively as *Orders*.

[8] The Commission's grant of defendants' petition for a longer stay pending a final resolution of the litigation had been expressly conditioned upon defendants placing the cable television properties that they had unlawfully constructed into a trust arrangement in accordance with terms that the Commission specified in an appendix to its order. Defendants never availed themselves of such alternative to immediate divestiture.

[9] Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205, 1206-07, 1210 (D.C. Cir. 1987) (*Court's Order*).

[10] Item 15, Form 401 asks:

> Has any court finally adjudged the applicant or any person directly or indirectly controlling the applicant guilty of unlawfully monopolizing or attempting to monopolize radio communications, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition?

[11] Item 17, Form 401 asks:

> Is applicant or any person directly or indirectly controlling the applicant presently a party in any pending matter referred to in Items 15 and 16?

[12] 47 U.S.C. 504 (c) provides as follows:

> In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

[13] *Character Qualifications* involved character qualifications for broadcast licensees, and the Commission has not extended the broadcast policies to common carriers. *Character Qualifications Reconsideration Order*, 1 FCC Rcd at 424. Nevertheless, that policy statement is instructive with respect to how the Commission generally evaluates misconduct and misrepresentation. *Id.* The Commission has stated that a licensee's integrity "is as essential to common carrier applications and reports as it is to those of broadcasters." Pass Word, Inc., 76 FCC 2d 465, 469 (1980), *aff'd per curiam Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 840 (1982).

[14] Accordingly, the question of fact raised here to be resolved is whether the applicant is in compliance with the outstanding Commission orders in the *Comark Cable Fund III* proceeding. In *Comark Cable Fund III*, 104 FCC 2d 451, 460-461, the Commission denied defendants' request for a hearing before an adminstrative law judge which was made long after the initial *Order*, *supra*, was issued. The Commission found that it was not necessary to conduct such a hearing because defendants were given ample opportunity to place evidence in the record and the decision was rendered on uncontroverted facts. We caution all the parties here and any who seek to intervene not to seek reopening the record in the proceeding underlying the Commission's *Orders*, *supra*. *See Order on Remand*, *supra*, at n.40.

[15] We disagree with Mussman's apparent contention that, because NITCO has not paid a forfeiture imposed on it by the Commission's *Orders*, 47 U.S.C. 504(c) precludes consideration of the findings in those *Orders* in this preceeding. This proceeding involves an examination of whether Mussman's apparent disregard of effective Commission orders requiring him to divest himself of unlawfully constructed cable television systems should disqualify him as a Commission cellular licensee. The fact that NITCO has not paid a20,000 forfeiture (and is appealing the underlying basis for it) is not an issue in this hearing.

[16] Mussman was predecessor to, and is the president and sole officer, director, and shareholder of, Northwest which does business under the name Northwestern Indiana Cablevision. Mussman also served as Executive Vice President of NITCO prior to 1983 and as a consultant to it until at least May 28, 1983. The Commission found that in his former capacity, Mussman conducted pole attachment negotiations even though he had been directly engaged in securing cable television franchises in the same communities for his own cable television operations. Comark Cable Fund III, *supra*, 104 FCC 2d at 453 n.2.

[17] *See* Application Filing Procedures, *supra*, at 144; *see also* Alltel Cellular Associates of the Carolinas, 61 Rad. Reg. 2d (P&F) 225 (1986).

[18] *See* Application Filing Procedures, *supra*, at 144.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-529

In re Application of

Denny Workman d/b/a MORTON BROADCASTING — File No. BPCT-870331LQ

For Construction Permit Morton, Washington

HEARING DESIGNATION ORDER

Adopted: October 31, 1988; Released: November 28, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application for a new commercial television station to operate on Channel 39, Morton, Washington.

2. The Commission's records disclose that Workman was a principal in Golden Bear Communications General Partnership (Golden), an applicant for a new FM radio station on Channel 274C, Juneau, Alaska, which was designated for comparative hearing (MM Docket No. 87-540). By Memorandum Opinion and Order, released August 11, 1988, the presiding Administrative Law Judge added the following issues against Golden:

> 1. To determine whether Mr. Workman made false statements or was, lacking in candor when he certified his financial, qualifications for his applications for Wichita, Kansas, (File, No. BPCT-870331PZ), and Morton, Washington (File No., BPCT-870331LQ).
>
> 2. To determine whether the applications filed by Mr. Workman, on March 31, 1987,[1] were filed for the purpose of building, and operating the applied for stations or whether they were, filed for the purpose of reaching or carrying out a settlement, agreement.

Golden's application was dismissed for failure to prosecute on August 11, 1988, so that these issues were not resolved. Under these circumstances, we cannot find Workman qualified to be a Commission licensee without a hearing to resolve the issues raised in MM Docket No. 87-540.[2] Accordingly, appropriate issues will be specified in this proceeding.

3. No determination has been reached that the tower height and location proposed by Workman would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. Workman proposes to operate from a site located within 250 miles of the Canadian border with maximum visual effective radiated power (ERP) of more than 1000 kilowatts. The proposal poses no interference threat to United States television stations; however, the proposal contravenes an agreement between the United States and Canada which limits the maximum visual ERP of United States television stations located within 250 miles of Canada to 1000 kilowatts. *Agreement Effectuated by Exchange of Notes*, T.I.A.S. 2594 (1952). Accordingly, in the event of a grant of the application, the construction permit shall be appropriately conditioned.

5. Except as indicated by the issues specified below, the applicant is qualified to construct and operate as proposed. The Commission, however, is unable to make the statutory finding that grant of the application would serve the public interest, convenience and necessity. Therefore, the application must be designated for hearing on the issues specified below.

6. Accordingly, IT IS ORDERED, that pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned application IS DESIGNATED FOR HEARING in a proceeding to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine:

(a) whether Mr. Workman made false statements or was lacking in candor when he certified his financial qualifications for his applications for Wichita, Kansas (BPCT-870331PZ), and Morton, Washington (BPCT-870331LQ);

(b) whether the applications filed by Mr. Workman on March 31, 1987, were filed for the purpose of building and operating the applied for stations or whether they were filed for the purpose of reaching or carrying out a settlement agreement or agreements;

(c) if issue 1(a) or issue 1(b) is resolved against Mr. Workman, the effect thereof on his basic qualifications;

2. To determine whether Mr. Workman is financially qualified to construct and operate the proposed Morton television station;

3. To determine whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation;

4. In light of the evidence adduced pursuant to the foregoing issues, to determine whether the application should be granted.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to Issue 3.

8. IT IS FURTHER ORDERED, That, in the event of a grant of this application, the construction permit shall be conditioned as follows:

> Subject to the condition that operation with effective radiated power in excess of 1000 kW is subject to the consent of Canada.

9. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicant and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Mr. Workman shall attach to his notice of appearance a remittance of 6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] *Authorized stations:*

Denny Workman, d/b/a Wichita Communications, is the permittee of a new full service television construction permit at Wichita, Kansas (BPCT-870331PZ).

Pending applications:

Denny Workman, d/b/a Quincy Communications, is an applicant for authority to construct a new FM station at Quincy, Florida, on FM Channel 274A.

Denny Workman, d/b/a Greensboro Communications, is an applicant for authority to construct a new AM station at Greensboro, North Carolina, on 1470 kHz (BP-870331CC).

Denny Workman, d/b/a Harrison Communications, is an applicant for authority to construct a new FM station at Harrison, Ohio, on FM Channel 282A (BPH-870331NL).

Returned applications:

Denny Workman, d/b/a Rancho Mirage Communications, was an applicant for authority to construct a new FM station at Rancho Mirage, California, on FM Channel 258A (BPH-870331MK, returned on May 9, 1988).

Denny Workman, d/b/a Clifton Communications was an applicant for authority to construct a new FM station at Clifton, Texas, on FM Channel 277A (BPH-870331MU, returned on November 9, 1987; petition for reconsideration filed December 10, 1987).

Dismissed applications:

Denny Workman, d/b/a Cedar Rapids Broadcasting, was an applicant for authority to construct a new television station at Cedar Rapids, Iowa (BPCT-870331PW).

[2] By letter dated September 14, 1988, the Commission notified Mr. Workman that this application could not be granted without a hearing and requested that he advise the Commission whether he wished to prosecute his application through the hearing process. By letter from his attorney dated September 27, 1988, Mr. Workman responded affirmatively.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-612

In the Matter of

Amendment of Section 73.202(b), RM-5873
Table of Allotments,
FM Broadcast Stations.
(North Little Rock, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 28, 1988; Released: November 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 320 (1988), issued in the above-captioned proceeding in response to a petition filed by Earl N. Hodges, d/b/a Mid-South Frequency Monitoring Service (petitioner), proposing the allotment of Channel 266A to North Little Rock, Arkansas, as that community's first local FM service. Petitioner filed supporting comments reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by alloting Channel 266A to North Little Rock since it could provide a first local FM service to the community.

3. As indicated in the *Notice*, Channel 266A can be allotted to North Little Rock consistent with the minimum distance separation requirements of Section 73.207(b) of the Rules, provided the transmitter is sited in an area at least 9.3 kilometers (5.8 miles) northwest[1] of the community to avoid short-spacing to Station KLRE-FM, Channel 213C2, Little Rock, Arkansas,[2] as well as to Channel 267A, Pine Bluff, Arkansas. [3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
North Little Rock, Arkansas	266A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 266A at North Little Rock, Arkansas, will open on **January 10, 1989,** and close on **February 9, 1989.**

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Reference coordinates at the restricted site are 34-49-06 and 92-19-58.

[2] Reference coordinates at the licensed site of Station KLRE-FM are 34-40-29 and 92-19-04.

[3] Reference coordinates for Channel 267A at Pine Bluff, Arkansas (allotted in MM Docket 84-231), are 34-13-24 and 92-01-00. The site restriction is also compatible with three pending applications for that facility at Pine Bluff.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-522

In the Matter of

Amendment of Section 73.202(b),	RM-5971
Table of Allotments,	RM-6243
FM Broadcast Stations.	
(Red Lodge, Montana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 28, 1988; Released: November 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the the *Notice of Proposed Rule Making*, 2 FCC Rcd 7081 (1988), proposing the substitution of FM Channel 258C2 for Channel 257A at Red Lodge, Montana, and modification of the construction permit to specify operation on Channel 258C2. The *Notice* was issued in response to a petition filed by C. R. Crisler (petitioner). Comments and a counterproposal were filed by petitioner.[1] Aerial Audio Broadcasting, Inc. (Aerial) filed opposition comments. Petitioner filed reply comments. No other comments were received.

2. Aerial Audio Broadcasting, Inc., licensee of KRBN-AM, Red Lodge, Montana, filed comments opposing the upgrade at Red Lodge. Aerial argues that petitioner's proposed site, located within the city of Red Lodge, is beyond the required minimum separation requirement, but would have a radiation center only 48 feet above ground. Aerial charges that the proposed facility would hardly provide any greater coverage or service to the public than would its Class A facility. According to Aerial the proposed site should be on Grizzly Peak to provide the most efficient and effective use of the proposed Class C2 facility, but such site would conflict with Station KBIL, Helena, Montana.

3. Petitioner filed a counterproposal in this proceeding requesting the substitution of Channel 258C1 in lieu of Channel 258C2. According to petitioner, a Class C1 channel would be more appropriate as a first wide area channel for Red Lodge, the C1 channel is equally workable in the community and his permit for Channel 257A should be modified to specify operation on Channel 258C1.

4. Petitioner, in reply comments, contends that Aerial's statements concerning mileage separation requirements, transmitter siting considerations and terrain in the area surrounding Red Lodge are not relevant in the rule making context. Petitioner further states that his proposal meets all mileage requirements to all known existing or allotted channels and that it is his desire to provide wide area service from one of several transmitter sites under consideration at this time. Petitioner alleges that Aerial's opposition comments are intended to add additional time to this proceeding which can cause delays that are economically devastating to a new business.

5. After consideration of the above information, we believe the public interest would be served by substituting Channel 258C1 for Channel 257A at Red Lodge, Montana, as requested in petitioner's counterproposal. Our staff analysis indicates that Channel 258C1 can be allotted to Red Lodge in compliance with the Commission's minimum distance separation requirements without a site restriction.[2] As proposed, we shall modify the construction permit for Channel 257A, Red Lodge, to specify Channel 258C1 in accordance with Section 1.420(g) of the Rules. As for Aerial's allegations we note that petitioner has shown that an area exists where a fully spaced transmitter can be sited. Further speculation as to the facilities petitioner will propose at the application stage is inappropriate at the rule making stage.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Red Lodge, Montana	258C1

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 257A, Red Lodge, Montana, IS MODIFIED to specify operation on Channel 258C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the petition for Channel 258C2 and this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given on January 27, 1988, Report No. 1709 (RM-6243).

[2] The coordinates for Channel 258C1 at Red Lodge are 45-11-15 and 109-14-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-149

In the Matter of

Amendment of Section 73.202(b), RM-6128
Table of Allotments,
FM Broadcast Stations.
(Wabasha, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 28, 1988; Released: November 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2210 (1988), proposing the allotment of FM Channel 273A to Wabasha, Minnesota, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Interstate Communications, Inc. (petitioner). Petitioner filed comments in support of the *Notice*. No other comments were received.

2. Channel 273A can be allotted to Wabasha, Minnesota, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 4.6 kilometers (2.9 miles) west of the community.[1] The site restriction will prevent a conflict with Station WHTL-FM, Channel 272A, Whitehall, Wisconsin.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Wabasha, Minnesota	273A

4. The window period for filing applications will open on **January 10, 1989,** and close on **February 9, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 273A at Wabasha are 44-23-06 and 92-05-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-157

In the Matter of

Amendment of Section 73.202(b),	RM-6150
Table of Allotments,	RM-6437
FM Broadcast Stations.	
(Arcadia and Manistee,[1] Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 28, 1988; Released: November 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 3 FCC Rcd 2217 (1988), issued in response to a petition filed by Kenneth J. Burch (petitioner), requesting the allotment of FM Channel 300A to Arcadia, Michigan, as that community's first local FM Broadcast station. J. Edward Rassel (Rassel) filed a counterproposal.[2] E. Harold Munn, Jr. & Associates, Inc., (Munn) filed comments. No other comments were received.

2. Rassel's counterproposal requests the allotment of Channel 300A to Manistee, Michigan, as that community's second FM broadcast service. Rassel indicates that Manistee is the county seat for Manistee County and is the largest community in the County. According to Rassel, the majority of the population within the county is near Manistee and not Arcadia and Arcadia is already served by stations in Frankfort and Bear Lake, Michigan. Rassel states that if Channel 300A is allotted to Manistee, he will apply for a construction permit to build and operate a station in that community.

3. In his comments, Munn indicates that he had prepared the request for Channel 300A at Arcadia for the petitioner, that numerous attempts to contact petitioner had been unsuccessful, and that it is not possible to determine whether there is any interest in the allotment of a channel at Arcadia. Munn further indicates that should Channel 300A be allotted to Arcadia, the recent allotment of Channel 298A at Traverse City, Michigan could be foreclosed from a potential upgrade to Class C2 facilities. According to Munn there are several other channels available for allotment at Arcadia which would not preclude the upgrade at Traverse City.

4. As stated in the Appendix to the *Notice*, continuing interest is required before a channel will be allotted to a community. Therefore, in accordance with the Commission policy, since no interest has been shown for a channel at Arcadia, Michigan, no further consideration will be given to the allotment of Channel 300A to that community.

5. We believe that the public interest would be served by the allotment of FM Channel 300A to Manistee, Michigan, as that community's second FM Broadcast service. The channel can be allotted to Manistee in compliance with the minimum distance separation requirements of the Commission's Rules. [3] Concurrence of the Canadian government has been obtained since Manistee is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Manistee, Michigan	249A, 300A

7. The window period for filing applications will open on **January 10, 1989,** and close on **February 9, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the counterproposal was given on July 6, 1988 (RM-6437).

[3] The coordinates for Channel 300A at Manistee are 44-14-48 and 86-19-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-163

In the Matter of

Amendment of Section 73.202(b), RM-6025
Table of Allotments,
FM Broadcast Stations.
(Osage City, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 28, 1988; Released: November 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 3 FCC Rcd 2425 (1988), issued in response to a petition filed by Osage Radio, Inc. (petitioner), proposing the substitution of FM Channel 225C2 for Channel 224A at Osage City, Kansas. Petitioner also requested the modification of its license for Station KZOC(FM) to specify operation on Channel 225C2. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 225C2 for Channel 224A at Osage City, Kansas, since it could provide the community with its first wide coverage area FM service. The *Notice* was conditioned on the grant of a license for Statio KTGL, Channel 225C1, Beatrice, Nebraska, to relocate its transmitter site in accordance with a construction permit issued by the Commission. The license for Station KTGL was granted on April 15, 1988 (BLH 871019KB). The substitution of Channel 225C2 for Channel 224A at Osage City can now be made in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. We have authorized a modification of petitioner's license for Station KZOC(FM), Osage City, Kansas, to specify operation on Channel 225C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 9, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Osage City, Kansas	225C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KZOC(FM), Osage City, Kansas, IS MODIFIED to specify operation on Channel 225C2 in lieu of Channel 224A, subject to the following conditions:

(a) The licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 225C2 at Osage City, Kansas are 38-33-42 and 95-52-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-531

In the Matter of

Amendment of Section 73.202(b), RM-6383
Table of Allotments,
FM Broadcast Stations.
(Paris, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1988; Released: November 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Benton-Weatherford Broadcasting of Tennessee, Inc. (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 231A[1] to Paris, Tennessee, as that community's first local FM service. Petitioner, licensee of AM Station WMUF, Paris, states its intention to apply for the channel, if allotted. The allotment can be made to Paris in compliance with the Commission's minimum distance separation requirements.[2]

2. In view of the fact that Paris, Tennessee, could receive its first local FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Paris, Tennessee	—	231A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **January 17, 1989,** and reply comments on or before **February 1, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Leonard C. Watson
250 N. Hale
Palatine, Illinois 60067
(Petitioner)

Anne Thomas Paxson
Borsari & Paxson
2100 M Street N.W.
Suite 610
Washington, D.C. 20037
(Counsel Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner originally requested the allotment of Channel 256A to Paris. However, that channel was in conflict with a separate proposal to upgrade Station WQZQ(FM) at Dickson, Tennessee, to Channel 273C1 from Channel 273C2. *See* RM-6483. In order to accomplish the Dickson upgrade Channel 256A was suggested as a substitute for Channel 272A at Benton, Kentucky. Therefore, in order to avoid the conflict and permit both proposals to be fully entertained we are considering Channel 231A at Paris in lieu of the originally requested channel.

[2] The reference coordinates are 36-18-12 and 88-19-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-65

In re Applications of

THE BALTIMORE RADIO SHOW, INC.	File No. BPH-860102NT
FIRST STATE BROADCASTING, INC.	File No. BPH-860102NX
KENT COUNTY RADIO LIMITED PARTNERSHIP	File No. BPH-860102NZ
SMYRNA BROADCASTERS LIMITED PARTNERSHIP	File No. BPH-860102OA
CENTRAL DELAWARE BROADCASTING CO.	File No. BPH-860102OB

For Construction Permit
for a New FM Station
Smyrna, Delaware

Appearances

Harry R. Shriver, pro se, on behalf of The Baltimore Radio Show, Inc.; *David M. Hunsaker* and *Denise B. Moline*, on behalf of First State Broadcasting, Inc.; *Harvey J. Shulman* and *Michael R. Bennet*, on behalf of Kent County Radio Limited Partnership; *Dennis J. Kelly*, on behalf of Smyrna Broadcasters Limited Partnership; *Shelley Sadowsky*, on behalf of Central Delaware Broadcasting Co.; and *Jerry M. Hermele*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: November 7, 1988; Released: November 28, 1988

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of The Baltimore Radio Show (BRS), First State Broadcasting, Inc. (First State), Kent County Radio Limited Partnership (Kent), Smyrna Broadcasters Limited Partnership (SBLP) and Central Delaware Broadcasting Co. (Central) for authority to construct and operate a new commercial FM station at Smyrna, Delaware.[1]

2. By *Hearing Designation Order* (*HDO*), DA 87-299, released March 25, 1987, 2 FCC Rcd 1766, the Commission designated the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by [all] applicants would constitute a hazard to air navigation.[2]
>
> 2. If a final environmental impact statement is issued with respect to any of the applicants, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 CFR §§1.201-1319.[3]
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. In addition, at ¶ 7 of the *HDO*, the Commission specified that the standard comparative issue would include consideration of a comparison of the areas and populations to be served by the parties.[4]

4. A prehearing conference was held on June 1, 1987. Hearing sessions were held on September 28 and 19, 1987. The record was closed on September 29, 1987 *(see Order*, FCC 87M-2436, released October 2, 1987). Proposed findings of fact and conclusions of law were filed on December 7, 1987 and replies were filed on December 21, 1987.

FINDINGS OF FACT

Standard Comparative Issue

The Baltimore Radio Show, Inc.

5. *Ownership and structure*. BRS is a for-profit corporation with the following officers, directors and shareholders:

Name	Office	Director	% of Voting Stock
Harry R. Shriver	President	Yes	1.572
Hope H. Barroll, III	Vice-Pres.	Yes	--
Vilma J. Smith	Secretary	No	.014
Daniel A. Bowles	Treasurer	No	
Lewis A. Noonberg	--	Yes	.299
John H. Somerville	--	Yes	--
Robert S. Maslin, Jr.	--	Yes	--
Robert M. Barroll	--	Yes	--
1984 Voting Trust	--	--	62.35

The trustees of the 1984 Voting Trust are Robert S. Maslin, Jr., Hope H. Barroll, III and Robert M. Barroll. Robert M. Barroll holds Voting Trust shares as trustee for Hope H. Barroll, III (BRS Ex. 1).

6. *Diversification.* BRS is the licensee of two AM radio stations: Stations WFBR(AM), Baltimore, Maryland, and WOYK(AM), York, Pennsylvania. Also, BRS is the license of Station WKHI(FM), Ocean City, Maryland. Each of BRS' stations is within a 100-mile radius of Smyrna, Delaware (BRS Ex. 3). The service area of Station WKHI(FM) includes communities located in Delaware (SBLP Ex. 4).

7. *Integration.* BRS does not propose to integrate any of its shareholders on a full-time or part-time basis into the day-to-day management of the station (BRS Ex. 2).

First State Broadcasting, Inc.

8. *Ownership and structure.* First State is a Delaware corporation with two classes of stock, voting and non-voting. Joseph P. Farley, Sr. is President, Director and owner of 50% of the voting stock and 25% of the non-voting stock of First State. Paul L. Teeven is Secretary, Treasurer, Director and owner of 50% of the voting stock and 75% of the non-voting stock of First State (First State Ex. 1).

9. *Diversification.* First State is the licensee of a full-time AM station, WKEN(AM), Dover, Delaware (Tr. 102). First State's principals, Messrs. Farley and Teeven are also principals of Blue Hen Broadcasting, Inc. (Blue Hen), licensee of full-time Station WAMS(AM), Wilmington, Delaware (First State Ex. 2; Tr. 103). Mr. Farley is President, Director and owner of 50% of the voting shares and 50% of the non-voting shares of Blue Hen stock. Mr. Teeven is an officer and director and owner of 50% of the voting shares and 50% of the non-voting shares of Blue Hen stock (Tr. 107; First State Ex. 2). No pledge was made to divest either of the broadcast interests of First State's principals.

10. *Integration.* Joseph P. Farley, Sr. intends to be integrated as the General Manager of the station on a full-time basis (a minimum of 40 hours per week) during the construction and first six months of initial operation of the station. After the initial six months of station operation, First State will employ a station manager who will manage the day-to-day affairs of the station. After the first six months of station operation, Mr. Farley will act only in an oversight capacity and will not have a job at the station (Tr. 115- 117). First State proposes that, after the first six months of operation, Mr. Farley will spend a minimum of 20 hours per week at the station in this oversight capacity. *Id.* Mr. Farley has no set schedule as to the time he will spend at the station and intends to spend one or two nights a week in Smyrna (Tr. 112-114).

11. Mr. Farley is a resident of Wilmington, Delaware, which is located outside the proposed service area of the Smyrna station (Tr. 98). He does not intend to move from his current residence in the event First State's application is granted (Tr. 111). Mr. Farley has broadcast management experience dating from April 1986, when First State acquired Station WKEN(AM), Dover, Delaware. *Id*, p. 2. Mr. Farley currently devotes less than two hours per week to Station WKEN (Tr. 118). He currently devotes a minimum of 20 hours per week to Station WAMS, Wilmington (Tr. 109). He also devotes approximately 10 hours per week to Farley Printing Company, a company which he solely owns and which is located in Wilmington, Delaware (Tr. 107-08). The record does not reflect that Mr. Farley intends to reduce the amount of time devoted to his other business interests.

Kent County Radio Limited Partnership

12. Kent is a limited partnership formed under the laws of the State of Delaware with the following partners and their equity and voting interests in the partnership:

Name	Office	Equity	Voting
Cynthia Richardson	General Partner	51%	100%
A.P. Communications Limited Partnership	Limited Partner	24.5%	0%
Smyrna Radio Limited Partnership	Limited Partners	24.5%	0%

(Kent Ex. 1).

13. Kent was formed as the result of the merger of Cynthia Richardson (Richardson), A.P. Communications Limited Partnership (A.P.) and Smyrna Radio Limited Partnership (SRLP), three prior applicants in the proceeding whose joint request for approval of the merger was approved by the Presiding Judge on August 7, 1987 (FCC 87M-1889). As a result of the merger, the applications of A.P. and SRLP were dismissed with prejudice, Richardson's application was amended in accordance with the agreement among the three parties, and Kent was substituted for Richardson.

14. *Diversification.* Kent's sole general partner, Cynthia Richardson, has no ownership interest in any other media of mass communications (Kent Ex. 1).[5]

15. *Integration.* Kent proposes the full-time integration of Ms. Richardson into the management of the proposed station (Kent Ex. 1). Ms. Richardson was born in Bridgeport, Connecticut, on November 6, 1947 (Kent Ex. 2). Ms. Richardson is a Black American and a female. *Id.* She graduated from Trumbull High School, Trumbull, Connecticut, in 1965. Ms. Richardson received a Bachelor of Arts degree from Howard University in English in 1969 and a Master Degree in English and secondary education from Catholic University in 1970. *Id.* She currently resides in the Wilmington, Delaware, area at R.D. 3, Box 159A, Hockessin, Delaware, 19707. *Id.* Ms. Richardson has resided there and elsewhere in the Wilmington area for eleven years, from 1976 to the present. *Id.* If Kent is awarded the construction permit, she will move to Smyrna, Delaware. *Id.*

16. If Kent is awarded the construction permit, Ms. Richardson will be integrated into the management and operation of the station. *Id.* She will work full-time, at least 40 hours per week, as General Manager of the station. *Id.* She will oversee all aspects of station management, including programming, operations, sales and business, and will determine major station policies. *Id.* She will be responsible for implementing the station's EEO program. *Id.* She will have the sole authority to hire and fire employees of the station. *Id.*

17. Ms. Richardson currently works as a consultant to the Du Pont Company in the area of telecommunications and computer software training. *Id.* She has been an independent contractor for Du Pont since March of 1986. *Id.* She had no formal training or prior experience in this area before becoming a consultant, but developed the required skills and knowledge "on-the-job" and now su-

pervises five persons. *Id.* If Kent is awarded the construction permit, Ms. Richardson will cease her present employment (Tr. 171, 259).

18. Prior to her present position, Ms. Richardson was employed for a year and a half by Delaware First, a social service organization, as a special events coordinator (Kent Ex. 2). In that job she coordinated large media events such as a production and performance showcasing Afro-American talent and a fundraising drive for the United Negro College Fund. *Id.* From 1983 to 1984 she was employed by the Red Clay Consolidated School District in Delaware as a 9th grade science teacher. *Id.* Before 1983, Ms. Richardson was employed as a planner for the Community Action Agency of Greater Wilmington which involved the area comprising Smyrna, Middletown, Odessa, and Townsend, Delaware (Tr. 173). In this job she was directly involved in writing grants for Smyrna Head Start and Day Care. *Id.*

19. As to civic activities, beginning in 1981 Ms. Richardson served for a year and a half as an appointee of The Governor on the Commission on the Status of Women, located in Dover, Delaware (Tr. 216; Kent Ex. 2). The Commission has held some of its meetings at the State House in Dover (Tr. 215). Ms. Richardson attended Commission meetings in Dover and other parts of the state, discussing issues such as the need for Day Care Centers in the Smyrna-Dover area. *Id.* 217. In her role as an appointee to the Commission, Ms. Richardson was also a major participant in a Black Women's conference held in Wilmington. *Id.* 219. The Commission arranged for transportation for people in the Smyrna-Dover area to attend the conference. *Id.* Ms. Richardson later participated in a workshop in Dover, speaking about the previous year's Black Women's conference. *Id.* 223.

20. She has been a member of Read Aloud Delaware since the organization's inception in 1984 and has been a member of its Kent County steering committee, which is based in Dover and has operations in Smyrna, since the beginning of 1987 (Kent Ex. 2). Read Aloud Delaware is part of a nationwide program to promote literacy. *Id.* 225. The organization distributes books through pediatricians so that mothers can read to their children. *Id.* Read Aloud Delaware has always had members and sites throughout the state including the Smyrna-Dover area (Tr. 252-253). As a member of the Kent County Steering Committee, Ms. Richardson has done public relations work in preparation for the annual state-wide meeting to be held in Dover. *Id.* 226.

21. Ms. Richardson is a member of the Board of Directors of OperaDelaware, a cultural organization serving all of Delaware (Kent Ex. 2). She has been involved with Opera Delaware since 1985 and has been on the Board of Directors since approximately June of 1987 (Tr. 230). Prior to her becoming a board member she did some promotional work for the organization. *Id.* 231. Ms. Richardson is currently producing an opera, a project which began in 1985. *Id.* 230-231. Delaware has only one theatre that can hold an opera. *Id.* 228. It is located in Wilmington. *Id.* 229. OperaDelaware provides transportation for and recruits members from the population of Kent County and the Smyrna-Dover area. *Id.* 229, 256. Ms. Richardson has been drafting plans for implementing the transportation of audience members from the Smyrna Dover area. *Id.* 266. The organization has always maintained contact with people in the Smyrna-Dover area as far as ascertaining their needs and interests with respect to opera. *Id.* 256. The Board of Directors has discussed the possibility of establishing an opera guild in the Smyrna-Dover-Kent County area. *Id.*

22. Ms. Richardson has been a member of a steering committee of the Brandywine Professional Association for the past three years (Kent Ex. 2). This organization raises funds to award scholarships to academically successful minority students, including students from the Smyrna-Dover area. *Id.* These scholarships are awarded after consultations with educators, principals and counselors of public schools in the Dover-Smyrna area (Tr. 236-237, 256). The organization has members from all over the state including the Dover area (Tr. 234). As a member of the organization, Ms. Richardson attended meetings with members from the Dover area (Tr. 232). As a member of the steering committee, she helped plan the annual meeting at which the scholarships are awarded.

23. Since 1984 Ms. Richardson has been involved in the Junior League of Wilmington, Delaware's only Junior League (Kent Ex. 2). The Junior League has members from all over the state (Tr. 239). Activities of the League extend throughout the state, including the Smyrna-Dover area. *Id.* Through the Junior League she is a member of a fundraising committee for the construction in Wilmington of a Ronald McDonald House, an institution designed to serve children from all over the state of Delaware, particularly those from Kent and Sussex Counties (Dover-Smyrna), who have found themselves hospitalized with various serious diseases and who can only receive treatment in Wilmington. *Id.*; Tr. 257. The Ronald McDonald House serves as a place where parents of these children, many of whom live in the Smyrna-Dover area, may stay while their children receive treatment (Tr. 240, 257). Ms. Richardson participated in fundraising and recruitment of volunteers to work at the Ronald McDonald House. *Id.* 239-240. Through the Junior League, from 1984-1985 she was on a steering committee of the Delaware Women's Conference composed of women from all over the state (Kent Ex. 2). This conference consisted of workshops divided into geographical areas of Delaware where women from each part of Delaware, including the Smyrna-Dover area, discuss the particular interests and problems of women in that area (Tr. 244). Although the conference was held in Newark, Delaware, the Junior League provided transportation as well as babysitting and child care services to women from the Kent County-Smyrna-Dover area. *Id.* at 243.

24. Ms. Richardson has served as a fundraiser for Delaware State College, located in Dover, since 1981 and has been a conference attendee as a representative of that college at the American Association of Governing Boards for Universities and Colleges in 1985 (Kent Ex. 2). She solicited funds for the Luna Mishoe Scholarship fund and for the purpose of establishing a nursing program at Delaware State College, a program which will be the first of its kind in Kent County. *Id.* 257. Such a program will provide the opportunity for the first time to students from Smyrna and Dover to study nursing in their own county. *Id.* 257-258. Approximately 40% of the student population of Delaware State College consists of commuters from the Dover-Smyrna area. *Id.* 258. Ms. Richardson has also been a member of the Peninsula Press Club, located in Dover, since June of 1987 and has attended several meetings (Kent Ex. 2); Tr. 248). The Club fosters an exchange of ideas among members of the press located in Kent County. *Id.* Over the years she has spent an average of three

hours a week on these various activities, and will continue to spend a like amount of time on these or similar activities in the future. *Id.*

Smyrna Broadcasters Limited Partnership

25. *Ownership and structure.* SBLP is a Delaware limited partnership. Its limited partnership agreement was filed with the state of Delaware on January 7, 1986, subsequent to the filing of SBLP's application in this proceeding (SBLP Ex. 4; Tr. 500). Alfred C. Cordon is the purported sole general partner, holding a 75% equity interest. Darrell E. Baugess is the purported limited partner, holding a 25% equity interest (SBLP Ex. 1). The record reflects that Mr. Baugess has performed engineering services on SBLP's behalf. He prepared and signed the engineering portion of the application, participated in the preparation of SBLP's comparative coverage exhibit, and was involved in the work necessary to determine a new tower site for SBLP (Tr. 365-366). He provided advice to Mr. Cordon, SBLP's general partner, concerning equipment necessary for the station's facilities (Tr. 368-369). Mr. Cordon testified that it would be acceptable to him, Mr. Cordon, if Mr. Baugess were to continue to provide engineering consulting work to SBLP's Smyrna station (Tr. 369).

26. *Diversification.* LaVonne H. Cordon, wife of SBLP's general partner, Alfred C. Cordon, owns a 10 percent common stock interest in Sun Valley Radio, Inc., the licensee of Stations KSKI(AM)-FM, Sun Valley-Hailey, Idaho, and a 10 percent common stock interest in Western Communications, Inc., the licensee of Stations KBLI(AM)-FM, Blackfoot, Idaho (SBLP Ex. 1). Mrs. Cordon is the licensee of a common carrier SMR (Specialized Mobile Radio) licensed to Charlotte Hall, Maryland (Tr. 350-351). Darrell Baugess owns 15% of Ravena Broadcast Partners, an applicant for a new FM station at Ravena, New York. Mr. Baugess also owns 20% of New Age Broadcasting, an applicant for a new FM station at Crooksville, Ohio. Mr. Baugess' wife, Rita Capobianchi is the sole proprietor of a new FM station at Murrells Inlet, South Carolina, 100% owner of Selbyville Broadcasting Company, Inc., applicant for a new FM station at Selbyville, Delaware, and 100% owner of Green Valley Broadcasting, applicant for a new FM station at Charlottesville, Virginia (Tr. 340). No promise was made to divest any of the above-referenced media interests in the event SBLP's application is granted.

27. *Integration.* SBLP does not propose to integrate its ownership into the management of the station (SBLP Ex. 1).

Central Delaware Broadcasting Co.

28. *Ownership and structure.* Central was incorporated under Delaware law on January 2, 1986. It has a total of 1000 shares of authorized capital stock. Phyllis Goldstein owns all 1000 shares of Central's stock. Phyllis Goldstein is the sole Director and officer (President, Secretary and Treasurer) of Central (Central Ex. 1).

29. *Diversification.* Neither Central nor Phyllis Goldstein has any interest in any medium of mass communications. Ms. Goldstein's immediate family also has no such interests of any kind (Central Ex. 2, p. 3).

30. *Integration.* Phyllis Goldstein will be employed full-time (a minimum of 40 hours per week) as the general manager of Central's radio station. She will set station policy and supervise the day-to-day operation of the station. All department heads, *i.e.*, the programming director, sales manager and engineering/technical director, will report to her. She will oversee the hiring and firing of station staff, including the implementation of equal employment opportunity policies at the station (Central Ex. 2, p. 3).

31. In order to devote full-time to the management of Central's station, Ms. Goldstein has committed to terminate any other employment she may have at the time Central's application is granted. *Id.* She also intends to reside in the Smyrna area on a Monday-thru-Friday basis rather than engage in a daily commute from her residence in Swarthmore, Pennsylvania, which would take approximately one hour and 15 minutes by car. *Id.*

32. Phyllis Goldstein (nee Young) is a Chinese American female, born in Philadelphia, Pennsylvania in 1947. She has resided in Swarthmore, Pennsylvania for the past ten years. She spent her entire childhood in Wilmington, Delaware, until graduation from high school in 1965 (Central Ex. 2, p. 1). She then attended the University of Delaware, Newark, Delaware, for three years. Ms. Goldstein completed her college education once her daughter, born in 1969, was of elementary school age. In 1980, she obtained a Bachelor of Fine Arts Degree from the Moore College of Art in Philadelphia. Later that year she became employed full-time as an Art Director/Designer for Hal Lewis Designs, Inc., an advertising studio located in Philadelphia. In that capacity, she directed the work of commercial artists, illustrators, graphic designers, photographers and typesetters. She also dealt directly with some client advertisers or their in-house marketing staffs. After approximately four years with the advertising studio, Ms. Goldstein switched fields to take over the management of an emergency medical care center in Haverford, Pennsylvania, which she and her husband owned as an investment. She worked in excess of 40 hours per week managing the day-to-day operations of the medical center which had a staff of ten, including five physicians. Among her responsibilities were supervision of the center's accounts receivable and payable and the handling of staffing and patients' non-medical problems. She also directed the center's marketing efforts. She designed advertising brochures, approved copy for radio spots and determined at which hours the spots would air. Ms. Goldstein relinquished her position at the medical center when it was sold in June 1987, three months prior to the hearing in this proceeding (Central Ex. 2, p. 2).

Auxiliary Power

33. Each party proposes to install auxiliary power generating equipment for use in the event of emergencies (BRS Ex. 4; First State Ex. 4; Kent Ex. 1, p. 2; SBLP Ex. 1; Central Ex. 3).

CONCLUSIONS

Diversification

34. BRS is the licensee of two AM stations and an FM station, all located within a 100-mile radius of the city of license, Smyrna, Delaware. The FM station provides service to Delaware communities located in the southern part of the state. Accordingly, BRS is assessed a moderate diversification demerit.

35. First State is the licensee of an AM station in Dover, Delaware which is within the proposed service area of the Smyrna FM station, and First State's two principals are the owners of the licensee of an AM station in Wilmington, Delaware. Because of the proximity of First State's media interests, First State receives a substantial diversification demerit.

36. SBLP is attributed with the media interests held by LaVonne H. Cordon, the wife of SBLP general partner, Alfred H. Cordon, under the "spousal attribution doctrine", by which the media interests of one spouse are considered the interests of both partners for purposes of promoting greater media diversification. *Cannon Communications Corp.*, 58 RR 2d 950, 957-958 (Rev. Bd. 1985); *Alexander S. Klein*, 86 FCC 2d 423, 49 RR 2d 606 (Comm. 1981). Those interests consist of Mrs. Cordon's minority stockholder position in two FM stations located in Idaho. Her sole proprietorship license of a common carrier SMR licensed to Charlotte Hall, Maryland is not a media of mass communications as that term is understood under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Similarly, under the doctrine of spousal attribution, SBLP is to be attributed with the current media interest of Rita Capabianchi, wife of SBLP's purported limited partner, Darrell Baugess: 100% ownership of an FM station in South Carolina. It is the Commission's current policy in comparative hearings to assess the insulation of limited partners to a limited partnership applicant for purposes of determining whether limited partners' media interests will be attributed to a limited partnership. *Daytona Broadcasting Co., Inc.*, 60 RR 2d 1199 (Comm. 1986); *see also Attribution of Ownership*, 97 FCC 2d 997, 55 RR 2d 1465 (Comm. 1984), *modified*, 58 RR 2d 604 (Comm. 1985). In order to be found properly insulated, and thus avoid attribution of a limited partner's media interest, limited partnership applicants in comparative proceedings must demonstrate that their limited partners have refrained and will refrain from any material involvement in the management or operation of the partnership's media activities. *Daytona*, *supra*, 60 RR 2d 1202, n. 6. The evidence establishes that SBLP has not met its burden. Mr. Baugess has provided extensive engineering services to SBLP. Further, SBLP's general partner has made clear that his continued involvement in engineering matters on behalf of SBLP would be welcomed. Such services are expressly prohibited under the Commission's attribution policy. *See Attribution of Ownership*, 58 RR 2d at 620. In sum, in the absence of any claim of proper insulation on the part of Mr. Baugess, SBLP is also to be attributed the media interest of Mr. Baugess' wife under the doctrine of spousal attribution. Because these media interests are neither extensive nor in close proximity to Smyrna SBLP's diversification demerit is slight.

37. Central and Kent receive no diversification demerit. Kent's opponents argue that Kent should be awarded a diversification demerit due to the various media interests owned by Kent's two limited partners. This contention is rejected. The arguments are based solely on the language of Kent's Limited Partnership Agreement. No evidence has been presented that Kent's limited partners have had or will have any influence or control over the management of the partnership or the operation of the station.

38. The Commission has concluded "that limited partners are essentially passive investors without any influence or control over the applicant or licensee and that their mass media interests do not inherently affect the distribution or concentration of control within the industry." *Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 934-935 (1986). It is Commission policy that limited partnership interests are to be accorded non-cognizable status in the comparative hearing process so long as the general partners are properly insulated from any control or influence by the limited partners. *Id.* Such insulation can be demonstrated by a partnership agreement which prohibits a limited partner from (1) acting as an employee of the limited partnership if his functions relate to the media enterprises of the company; (2) serving, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; and (3) communicating with the general partner (i.e., voting) on matters pertaining to the day-to-day operation of the partnership business. *Memorandum Opinion and Order, Corporate Ownership Reporting and Disclosure By Broadcast Licensees*, 58 RR 2d 604, 619 (1985) (*Ownership Attribution*). [6]

39. Section 3.06 of Kent's Limited Partnership Agreement explicitly satisfies each of these insulation criteria. The Agreement specifies that:

> Limited Partners (and their partners) shall not (i) be permitted to take part in the control of the business or affairs of the Limited Partnership; (ii) have any voice in the management or operation of the Station or the Property; (iii) have the authority or power in the capacity of a Limited Partner to act as agent for or on behalf of the Limited Partnership or any other Partner, to do any act which would be binding on the Limited Partnership or any other Partner, or to incur any expenditures with respect to the Limited Partnership or the Property; (iv) act as an employee if his functions relate (directly or indirectly) to the Station; or (v) serve in any material capacity as an independent contractor or agent or in the performance of other services with respect to the Station.

Kent Ex. 3, p. 20. The agreement clearly insulates Kent's general partner from any possible control or influence by the limited partners. The very limited powers given to the limited partners by the partnership agreement involve no intrusion on the day-to-day affairs of the partnership business, are related to extraordinary decisions involving their right to protect their passive investments, and fully meet the Commission's standard for non-attribution -- i.e., "no material involvement." Therefore, Kent receives no diversification demerit.

Integration

40. Only three of the parties, First State, Kent and Central, seek credit for the proposed integration of ownership into the management of their respective stations. First State is entitled to no integration credit. First State claims entitlement to a substantial preference for its proposed full-time integration of its 50% shareholder, Joseph Farley, as the station's General Manager. However, Mr. Farley only proposes to serve as General Manager for the first six months of operation. Accordingly, First State is entitled to no full-time integration credit. *See* Policy *Statement on Comparative Broadcast Hearings*, 5 RR 2d 1901, 1909 n. 6 (1965) (integration proposals must be adhered to on a permanent basis); *Gainesville Media, Inc.*, 70 FCC 2d 58, 65 (Rev. Bd. 1978) (credit denied absent evidence of participation beyond first year). In addition, for the first

six months of station operation, Mr. Farley will be devoting in excess of 70 hours per week to his various business interests. As the Review Board has held, such a work week proposal "teeters on the outer limits of credibility." *See Northern Sun Corp.*, 57 RR 2d 1550, 1552 (Rev. Bd. 1985).

41. In the alternative, First State claims 50% part-time credit for Mr. Farley's proposal to work twenty hours per week at the station after the first six months. However, after the first six months, a station manager will be hired. Mr. Farley will act only in an oversight capacity, and will not have a job at the station. Since Mr. Farley will not be integrated into any management position at the station, his part-time proposal cannot be credited. Moreover, Mr. Farley has no set schedule as to the amount of time he will spend working at the station and intends to spend one or two nights a week in Smyrna. Therefore, Mr. Farley could end up working less than 20 hours per week at the station. Such a proposal is not entitled to enhancement credit. *See Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 1050 n. 5 (Rev. Bd. 1982); *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1495 (Rev. Bd. 1979).

42. Kent is entitled to 100% quantitative full-time enhancement credit. Cynthia Richardson, Kent's general partner will serve as the full-time general manager of the station and will oversee all aspects of station management including programming, operations, sales and business, and will determine major station policies. In addition, she will have sole authority to hire and fire employees of the station. No evidence has been offered raising the slighted doubt to Kent's entitlement to 100% integration credit.

43. Kent's opponents urge that Kent is entitled to only 51% integration credit representing the equity interest of Ms. Richardson. They point to the supposed influence of Kent's limited partners, using the same reasoning propounded in their failed effort to saddle Kent with a diversification demerit. Their reliance on provisions of Kent's Partnership Agreement is equally invalid here. Moreover, as noted in that discussion, the record is barren of any evidence that Kent's limited partners have had or will have any influence or control over the management or operation of the partnership or the station. Further, contrary to the assertions of the opposing parties, the fact that Ms. Richardson intends to hire a station manager to assist her has no bearing on Kent's integration credit.

44. Ms. Richardson is a Black American and a female. Kent is, therefore, entitled to substantial minority and female enhancement credit. Kent is also entitled to a slight qualitative enhancement credit for the proposed full-time residence of its sole general partner in the city of license. *Policy Statement*, 5 RR 2d 1901, 1910 (1965). Further, Kent is entitled to moderate enhancement credit for Ms. Richardson's extensive civic participation within and on behalf of residents of the service area of the proposed station. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1263 (1982); *KALT - FM, Inc.*, 49 FCC 2d 61 (Rev. Bd. 1974); *Lorain Community Broadcasting*, 13 FCC 2d 106, 108, 110 n. 4 (Rev. Bd. 1968); *Coastal Broadcasters, Inc.*, 3 RR 2d 949, 966-967 (Rev. Bd. 1964).

45. Central also receives 100% quantitative integration credit for the proposed full-time participation of its sole principal, Phyllis Goldstein, as general manager of the station. The parties are critical of Ms. Goldstein because of her reliance on her engineering and legal counsel in the preparation and prosecution of Central's application. However, no precedent has been cited that such reliance is improper or adversely affects integration credit. In this connection, there is no claim here of participation by a non-integrated principal or an outside party. On the contrary, the record reflects that Ms. Goldstein has been, is and will be the sole principal of Central. Central's integration proposal will be credited. Ms. Goldstein is a Chinese American female. Central will receive substantial minority and female enhancement credit. Central also receives slight enhancement credit for Ms. Goldstein's proposal to reside in the Smyrna area on a Monday-thru- Friday basis. Central is not entitled to civic participation enhancement credit.

Final Comparative Evaluation

46. The choice is between Kent and Central. The other applicants receive diversification demerits and are not entitled to integration credit. Kent and Central receive no diversification demerit and are entitled to 100% quantitative integration credit. Both receive equal minority and female enhancement credit. Similarly, both receive slight credit for their proposal to move to the service area. The critical difference between the applicants is that Kent receives civic participation enhancement credit and Central receives no credit. For this reason, Kent's application will be granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Kent County Radio Limited Partnership for a construction permit for a new FM station in Smyrna, Delaware IS GRANTED; and the applications of The Baltimore Radio Show, Inc., First State Broadcasting, Inc., Smyrna Broadcasters Limited Partnership, and Central Delaware Broadcasting Co. ARE DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Fourteen applicants were originally designated for hearing, six of which voluntarily dismissed their applications without consideration. *See Orders*, FCC 87M-836, released April 16, 1987; FCC 87M-874, released April 21, 1987; FCC 87M-922, released April 28, 1987; FCC 87M-2096, released September 8, 1987; FCC 88M-2363, released September 29, 1987. A seventh applicant was dismissed for failure to prosecute its application. *See* Order, FCC 87M-1733, released July 22, 1987. Three other applicants, Cynthia Richardson, A.P. Communications Limited Partnership and Smyrna Radio Limited Partnership merged to form Kent County Radio Limited Partnership, one of the five remaining applicants. *See* FCC 87M-1889, released August 11, 1987.

[2] By *Memorandum Opinion and Order*, FCC 88M-3764, released November 4, 1988, the Presiding Judge granted motions for summary decision and summarily resolved the air hazard issue favorably for each of the applicants. Such action was predicated on the applicants' having secured from the FAA a "no air hazard" determination with respect to their new sites. *See Memorandum*

Opinion and Order, FCC 88M-2719, released August 22, 1988; *Memorandum Opinion and Order*, FCC 88M-3656, released October 31, 1988.

[3] This contingent issue was mooted by the amendment of all parties' applications to propose new tower sites which raise no questions of adverse consequences to the environment. *See Memorandum Opinion and Order* of the Presiding Judge, FCC 87M-2708, released October 29, 1987.

[4] The comparative coverage question was resolved at hearing. The parties stipulated that no decisionally significant differences exist among their coverage proposals (Joint Exhibit 1).

[5] The limited partners' media interests have not been listed since for the reasons stated *infra*, it has been concluded that they should be accorded non-cognizable status in the comparative hearing process. *See Daytona Broadcasting Company, Inc.*, 103 FCC 2d 931, 934 (1986).

[6] *Ownership Attribution*, which dealt with attribution of limited partnership interests in the context of the Commission's multiple ownership rules, was held to apply to the comparative hearing process in Daytona, *supra*, 103 FCC 2d 934-935.

[7] In the event exception are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-534

In re Application of

CHARLES B. SHAFER File No. 22584-CD-AL-79

For authority to assign station KGC397 from Charles B. Shafer, Assignor, to Hazel-Tone Communications, Inc., Assignee

In re Application of

CHARLES B. SHAFER File No. 20095-CD-P-80

For authority to change antenna system and replace transmitter of Public Land Mobile Service station KGC397 operating at Mountaintop, Pennsylvania

ORDER DESIGNATING APPLICATIONS FOR HEARING

Adopted: November 16, 1988; Released: November 28, 1988

By the Chief, Common Carrier Bureau:

BACKGROUND

1. The Commission in 1981 granted the referenced applications for transfer of control and change of facilities and denied petitions to deny filed by Mobilfone of Northeastern Pennsylvania (Mobilfone). *Charles B. Shafer*, Mimeo 6705, February 6, 1981, *recon. denied*, FCC 84-342, released July 19, 1984. On appeal from that grant, the United States Court of Appeals for the District of Columbia Circuit (the Court) affirmed in part and reversed and remanded in part the Commission's decision. *Mobilfone of Northeastern Pennsylvania, Inc. v. FCC*, No. 84-1406, (D. C. Cir. May 13, 1985). The Court in that proceeding, directed the Commission to examine the candor of John P. Gabriele, president of Hazel-Tone Communications, Inc. (Hazel-Tone) the assignee, in connection with his placement of Yellow Pages advertising for the station. On August 20, 1986, the Commission released an order on remand finding that neither Gabriele nor Charles B. Shafer, the assignor, had lacked candor with this Commission. *Charles B. Shafer*, FCC 86-365.

2. Mobilfone appealed the order on remand. In that second appeal proceeding, the Commission requested and was granted a voluntary remand. *Mobilfone of Northeastern Pennsylvania, Inc. v. FCC*, No. 86-1514 (D. C. Cir. August 28, 1987). On this second remand we asked Shafer about the placement of the advertisement and Shafer's use of equipment belonging to Gabriele. Shafer responded on October 15, 1987. By order we directed Shafer, Hazel-Tone and Gabriele to produce relevant documents. *Charles B. Shafer*, DA 87-1759, released December 9, 1987. The parties complied with this order on December 24, 1987. We also inquired of the Bell Telephone Company of Pennsylvania (Bell of Pennsylvania) concerning the yellow pages advertisement in question. Bell of Pennsylvania responded on November 25, 1987. On February 3, 1988, Mobilfone requested an evidentiary hearing on whether Gabriele misrepresented material facts or lacked candor with the Commission.

DISCUSSION

3. On February 23, 1979, Shafer and Gabriele signed an agreement for the sale of Shafer's paging business to Gabriele's business, Hazel-Tone. On September 20, 1979, Shafer and Gabriele filed an application for consent to assign the license of station KGC397 to Hazel-Tone. On October 5, 1979, Shafer applied to change the transmitter and antenna facilities of station KGC397 from AM to FM transmission.

4. After analyzing the latest round of filings and the record in this proceeding we conclude that substantial and material questions of fact remain concerning a possible lack of candor or material misrepresentations to the Commission. For instance, on November 1979 a yellow pages advertisement for Shafer's paging service appeared in the Wilkes-Barre telephone directory. The order for this advertisement had been signed by Gabriele, on August 12, 1979. Gabriele contends that in signing the order he believed that he was only approving the copy and not signing a contract. Copies of the documents signed by Gabriele state, however, that it is a contract.

5. This apparent inconsistency raises a substantial and material question of fact concerning whether Gabriele misrepresented material facts or lacked candor with the Commission. In turn, this raises the question of whether Gabriele is qualified to be or to remain a Commission licensee. These questions need to be resolved in a hearing. Therefore, we are designating these matters for hearing on the issues specified below.

ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, that the captioned applications ARE DESIGNATED FOR A CONSOLIDATED HEARING pursuant to Section 309(c) of the Communications Act of 1934, upon the following issues:[1]

(1) To determine all the facts and circumstances surrounding the placing of the advertisement in the yellow pages directory.

(2) To determine all the facts and circumstances surrounding the use of Gabriele's transmitter by Shafer.

(3) To determine, on the basis of the evidence adduced above, whether Gabriele misrepresented material facts to the Commission or lacked candor.

(4) To determine, on the basis of the evidence adduced above, whether Gabriele is qualified to be a Commission licensee.

(5) To determine on the basis of all the above whether a grant of the applications would be in the public interest, convenience and necessity.[2]

7. IT IS FURTHER ORDERED, that the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

8. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act, the burden of proceeding with the introduction of evidence and the burden of proof shall be upon Hazel-Tone Communications Inc.

9. IT IS FURTHER ORDERED, that petitioner, John Gabriele, President of Hazel-Tone Communications, Inc., and the Chief, Common Carrier Bureau are made parties to this proceeding.

10. IT IS FURTHER ORDERED, that Mobilfone of Northeastern Pennsylvania's request for an evidentiary hearing IS GRANTED.

11. IT IS FURTHER ORDERED, that Gabriele may avail himself of an opportunity to be heard by filing with the Commission pursuant to Section 1.221 of the Rules within 20 days of the release date hereof, a written notice stating an intention to appear on that date for a hearing and present evidence on the issues specified in this Order. The expedited hearing procedures set forth in Section 1.822 are not conducive to the resolution of the issues in this proceeding. The procedures of Section 1.822 are not appropriate when the credibility and demeanor of witnesses is apt to be critical to resolution of the issues. Therefore, Section 1.822 will not be followed in this proceeding and the hearing shall be conducted pursuant to Sections 1.201, *et seq*.

12. This Order is issued under Section 0.291 of the Commission's rules and is effective on its release date. *See* Sections 1.4(b)(2)(Computation of time).

13. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock, Chief
Common Carrier Bureau

FOOTNOTES

[1] By Public Notice released November 17, 1988 we rescinded the grants of the referenced applications. We also granted special temporary authority to Hazel-Tone Communications, Inc. to continue to operate the facility until the resolution of this proceeding.

[2] The focus of our inquiry will be on the qualification of Gabriele, as the transferee to be a licensee. Depending upon the result of this inquiry, it may be necessary to consider also the qualifications of Shafer to be a licensee. We will pursue any further proceedings that may be appropriate to resolve this matter finally.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

Released: November 17, 1988

The grants made to Hazle-Tone Communications, Inc. File No. 22584-CD-AL-79 and File No. 20095-CD-P-80 on February 6, 1981, by order Mimeo 6705, are hereby rescinded. Hazle-Tone Communications Inc. may continue to operate these facilities under special temporary authority, effective upon release of this Notice, for a period of 180 days, renewable as required, pursuant to 47 U.S.C. Section 309(f) and 47 C. F. R. Sections 22.25 (b)(3) and 22.25(c). This action is taken so that Hazle-Tone Communications can continue to operate this facility and the public is not harmed by any disruption or discontinuance of service in this market until a final decision is reached in the hearing concerning these two licenses.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver by File No. 75319

TRANSTRACK, INC.
13 Marconi Lane
Marion, Massachusetts 02731

Applicant for a license for
a private carrier meteor
burst automatic vehicle monitoring
radio system.

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 1988; Released: November 28, 1988

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. The Private Radio Bureau has for consideration: (1) a Petition for Reconsideration, filed March 17, 1988, by the Association of Maximum Service Telecasters (MST); (2) an Opposition to the Petition, filed on May 6, 1988, by Transtrack, Inc. (Transtrack); and (3) MST's May 24, 1988, Reply to the Opposition. MST requests reconsideration of a Bureau *Order* [1] that granted Transtrack's request for waiver of the rules governing technical standards and frequency assignments for operation of automatic vehicle monitoring (AVM)[2] and meteor burst [3] communications systems. Pursuant to this waiver, on February 23, 1988, the Commission granted Transtrack a license for a business radio station for the purpose of operating a private carrier meteor burst AVM system throughout the United States on the frequencies 43.92 and 44.42 MHz on a secondary non-interference basis.[4]

2. MST is a non-profit association comprised of approximately 250 VHF and UHF television broadcast stations. MST seeks reconsideration of the Bureau's waiver decision, asserting that Transtrack's operations could result in substantial interference to television service.

II. BACKGROUND

3. Transtrack is a Massachusetts corporation that specializes in using remote data telemetry to measure physical oceanography. Transtrack decided to apply its experience in this field to implement a meteor burst communications system that would provide a private land mobile radio vehicle positioning and data communications service to the trucking industry.

4. On March 7, 1987, Transtrack filed an application proposing to operate a meteor burst communications system to determine and report the position of vehicles and to transmit limited two-way data communication between mobile units and dispatchers on a nationwide basis. The proposed system consisted of five base stations, located in remote unpopulated areas, that would operate with a maximum output power of 2040 watts on the frequency 43.92 MHz.[5] These base stations would employ crossed-dipole antennas that are 50 feet in height to transmit 2040 watt probe signals that reach a particular mobile unit on 43.92 MHz when a suitable path is provided by a meteor trail. After the reflected probe signal is received by a mobile unit, the unit would respond on 44.42 MHz with an intermittent 300 watt burst signal of extremely brief duration[6] consisting of position data and a text message, if desired.[7] Communications to and from the dispatchers of individual subscribers on the AVM system would be sent via telephone lines through Transtrack's central processing center in Marion, Massachusetts. Transtrack's application was accompanied by a request for waiver of various sections of the Commission's Rules that pertain to the technical standards and frequency assignments for AVM and meteor burst systems.

5. In acting on Transtrack's application and request for waiver, the Bureau's *Order* concluded that the meteor burst AVM communications system proposed by Transtrack would be in the public interest. We noted that implementation of Transtrack's system could improve scheduling and routing in the motor carrier industry. These efficiencies could benefit the economy by allowing reduced shipping rates. Thus, we determined that grant of Transtrack's waiver request would be consistent with the provisions of Section 90.239(e)(4) of the Commission's Rules, 47 C.F.R. § 90.239(e)(4), that recognize the need for flexibility with regard to AVM technology and provide that the Commission may modify the technical standards for such systems to assure efficient and effective spectrum utilization.

6. The Bureau's *Order* granted Transtrack's request for waiver of Sections 90.89, 90.203, 90.205, 90.239 and 90.250 of the Commission's Rules, 47 C.F.R. §§ 90.89, 90.203, 90.205, 90.239 and 90.250. The waiver permits Transtrack, a Business Radio Service eligible, to operate on 43.92 and 44.42 MHz, which are frequencies that are assigned for use in the Motor Carrier Service under Section 90.89 of the Rules.[8] It also authorized Transtrack to operate base stations with output power of 2040 watts, a power greater than the 300 watt maximum output power for 40 MHz band frequencies specified in Section 90.205.[9] Finally, the waiver relieved Transtrack from the provisions of Section 90.250 of the Rules that restrict meteor burst communications to the State of Alaska on discrete frequencies in the 40 MHz band that are different than those authorized to Transtrack.[10] As a result of our decision, Transtrack was granted a license for a business radio station to operate a meteor burst AVM system throughout the country consistent with Transtrack's proposed operating parameters.

III. THE PLEADINGS

7. In its petition, MST contends that Transtrack's system design virtually guarantees substantial interference to television service. In support of its contention, MST submits that Transtrack's meteor burst system has a base station signal strength of 126 dBu at 500 feet and mobile station signal strength of 134 dBu at 75 feet. It maintains, however, that interference for a typical television receiver begins at a signal strength of only approximately 86 dBu. Using these signal strength figures, MST claims that Tran-

strack's system could cause television interference within a radius of nearly ten miles from each base station and four miles from each mobile unit.

8. MST disagrees with Transtrack's representation, presented in its license application and waiver request, that the brief and infrequent mobile transmissions of Transtrack's subscribers pose no significant potential for TVI. Although these transmissions are only milliseconds in duration, MST points out that a television signal contains 6.5 fields during this brief period and that interference to that many fields would be noticeable. Thus, MST submits that the secondary non-interference nature of Transtrack's authorization is an inadequate safeguard in view of the probability and magnitude of the resultant interference.

9. MST questions the Bureau's reliance on the fact that several other meteor burst systems in the 40-50 MHz band are currently operating without any apparent interference problems. MST argues that it is inappropriate to rely on the absence of consumer complaints as an indication of the level of interference. Moreover, MST maintains that the Northern Natural Gas Company and SNOWTEL systems cited by the Bureau in its Order granting the waiver do not provide an adequate basis for comparison with Transtrack's station because they operate outside the television IF band with output power of 1000 watts or less. Similarly, it asserts that the Alaska meteor burst system, which has an authorized output power of 2000 watts, should be distinguished from Transtrack's system because it operates on a statewide rather than national level.

10. MST also argues that the Bureau erred in permitting Transtrack to operate its AVM meteor burst system on a secondary non-interference basis because Transtrack is not required to demonstrate that its operations can safely coexist with television. In this regard, MST urges the Bureau to require Transtrack to conduct a thorough, well documented and verified survey of the potential areas that may be subjected to interference from Transtrack's operations. It suggests that this survey contain appropriate field measurements and that Transtrack be required to submit a formal report to the Commission with signed statements from those individuals conducting the survey detailing how the study was performed.

11. Finally, as a procedural issue, MST objects to the fact that an "allocation decision" of this magnitude has been routinely decided by the Bureau's grant of Transtrack's waiver request. It argues that this decision effectively amends the Table of Allocations to permit a new national AVM meteor burst service to operate in the 43-44 MHz band. Consequently, MST believes that this matter should have been resolved by means of a full notice and comment rule making proceeding.

12. In its opposition, Transtrack emphasizes that the only element of the Bureau's waiver that is relevant to MST's petition is the waiver of Section 90.205 of the Rules that permits Transtrack's five base stations to transmit with 2040 watt output power rather than the 300 watt limitation for 40 MHz band frequencies specified in the rules. Transtrack argues that MST has no standing to object to the grant of Transtrack's mobile units because the authorized output power for these units does not exceed the maximum 300 watt limitation. Transtrack further notes that there are literally hundreds of thousands of private radio transmitters operating in the television IF band.[11] Unlike Transtrack's mobile units that operate for milliseconds, four times per hour, these units transmit voice communications for protracted periods of time. Many of these stations are fixed rather than mobile, and they employ directional transmissions as opposed to weak reflected meteor burst signals. Thus, even if MST had standing, Transtrack maintains that the potential television interference (TVI) from mobile meteor burst transmitters is *de minimis*.

13. Transtrack also states that the potential for interference in the immediate vicinity of its high powered base station transmissions is self-evident and was expressly recognized by Transtrack in its waiver request and supplemental letter.[12] It asserts that its selection of remotely located base station sites substantially minimizes the potential for TVI because there are few, if any, structures near those sites. Transtrack maintains that test results revealed that, with the exception of low quality, inexpensive black and white receivers, no TVI would be experienced more than a quarter of a mile from its base stations.[13]

14. Transtrack characterizes MST's assertion that TVI could extend nearly ten miles from Transtrack's base stations as "wholly unsupported speculation." Although MST provided no support for its calculation, Transtrack notes that MST apparently relied upon the "free space" formula for calculating the attenuation of signals.[14] Transtrack argues that the appropriate method of attenuation calculation in this instance, where its 50 foot base station antenna heights are close to the surface of the earth, is the "plane earth" formulas.[15] Thus, Transtrack maintains that the area exposed to the risk of TVI is more accurately less than one mile from its base stations where there are virtually no television receivers. In the unlikely event that TVI does occur Transtrack indicates that it will correct the problem by installing filters at the affected television receivers.

15. MST, in reply, takes issue with Transtrack's contention that plane earth formulas should be used rather than the free space method of calculating the attenuation of Transtrack's base station signals. MST alleges that when "Fresnel zone" clearance[16] is considered, the free space approach is correct. For example, at Transtrack's Park Valley, Utah site, MST reports that a profile data study revealed Fresnel zone clearance for a full ten mile arc from southeast to southwest, in the general direction where residences are located.

16. Finally, if Transtrack's secondary authorization remains in effect, MST argues that it should be subject to cancellation without a hearing upon notice of any TVI problems. MST requests that any application by Transtrack for primary status be placed on public notice.

IV. DISCUSSION

17. The ability to communicate by reflecting radio waves off of ionized meteor trails has been recognized since 1951. Until recently, this technology was used primarily for government operations because spectrum was not available for non-government use.[17] In 1983, in response to a petition filed by Media Data, Inc. (MDI), the Commission allocated four frequencies in the 40-50 MHz band for the use of meteor burst communications in the State of Alaska.[18] Because these frequencies fall within the passband of television receiver intermediate frequency (IF) amplifiers, the Commission decided that it would license meteor burst stations under a developmental grant policy in the event that the expanded use of this new technology caused harmful interference to others.[19] Pursuant to this

policy, the Commission issued a developmental common carrier license to MDI on January 30, 1984, for meteor burst station KNKC 522 in the Rural Radio Service. KNKC 522 consists of a central office base station transmitting with 2000 watt output power and remote units responding with 500 watt transmissions. MDI filed an application (File No. 60105-CR-ML-01-88) to upgrade to permanent primary status on March 1, 1985. The application was retained in pending status to ensure that there was no TVI associated with MDI's station operation. On August 30, 1988, the Commission unconditionally upgraded the license for KNKC 522 from developmental to permanent status. To date, the Commission has not received any reports of interference that are related to this station.

18. There are several other meteor burst systems that have not caused any known interference problems. For example, the Northern Natural Gas Company (ENRON, Inc.) has a developmental license to operate a meteor burst system on 48.68 MHz with a base station in Mynard, Nebraska and remote units in Minnesota, Michigan and Wisconsin to monitor data from pipelines.[20] Similarly, the Department of Agriculture operates its SNOWTEL meteor burst data acquisition system on 40.53 and 41.53 MHz with remote units in 11 western states to monitor water management resources. This system has base stations in Boise, Idaho and Ogden, Utah.[21] While these systems operate on the margins of the television IF band (41-47 MHz), we believe the lack of reported interference to television reception is significant. Moreover, as noted above, the MDI meteor burst system is authorized to operate on 42.40 and 44.10 MHz, which are frequencies within the IF band. Operation of this system has not resulted in any reported TVI problems.

19. There have been no significant reported complaints of TVI or co-channel interference resulting from government or civilian meteor burst operations in Alaska or in the Continental United States. Nor has MST submitted any evidence of significant interference problems resulting from the operations of any of the above meteor burst stations during the past several years. Despite the lack of any documented meteor burst related TVI problems, the waiver granted to Transtrack by this Bureau contained similar conditional non-interference safeguards to those adopted by the Commission when it first authorized meteor burst communications in 1983. Transtrack's authorization is on a secondary non-interference basis with respect to TVI as well as the operations of existing Commission licensees.[22]

20. Our waiver decision noted that Transtrack's license grant is subject to the condition that it must alleviate any TVI complaints or other interference conditions caused by its station or cease operation immediately. Transtrack must keep records of any interference complaints it receives and record any actions it takes to resolve problems. In addition, the Commission will investigate any complaints of TVI in the vicinity of Transtrack's base stations. There is, therefore, no basis for MST's claim that there are inadequate safeguards to ensure that Transtrack's system can safely coexist with television. Finally, any evidence of significant TVI, even if resolved, will be considered if Transtrack files an application for authority to operate on a primary basis.

21. Moreover, MST has no basis for seeking reconsideration of Transtrack's authorization with respect to its mobile units. These units are limited to the 300 watt output power for 40 MHz band frequencies specified in the rules.[23] Unlike most mobile units that routinely transmit voice communications for extended periods of time, Transtrack's units transmit sporadically with signals of brief duration. Such operation creates less interference potential than traditional mobile communications.

22. We are also not persuaded by MST's assertion that circuits internal to television receivers *might* respond to the Transtrack signals. The 43-44 MHz band transmissions from Transtrack's base stations and mobile units are not co-channel with any television station. We are aware of the importance of minimizing interference potential in television IF band. In this regard, however, we note that televisions incorporate a shield around the IF circuit in order to reduce the potential for such interference. Thus, MST has not adequately supported its contention concerning the probability of TVI problems.

23. We are similarly unpersuaded by MST's apparent reliance on the free space formula for calculating the attenuation of Transtrack's base station signals that are transmitted from 50 foot antennas. The plane earth formulas more accurately predict attenuation when the antenna height is close to the surface of the earth. In the instant case, using the estimated field strength studies contained in Section 73.699 of the Commission's Rules, 47 C.F.R. § 73.699, we conclude that the one mile area surrounding each of Transtrack's base station antennas is the area at greatest risk to interference. This is considerably less than the ten mile interference radius alleged by MST. Regardless of the exact radius of interference, and the mitigating effects of Fresnel zone clearance at a particular base station in a particular direction, Transtrack has committed itself to resolving all TVI complaints and its license grant is expressly conditioned upon such resolution.[24]

24. Finally, a rule making proceeding is not necessary to permit Transtrack, a Business eligible, to operate a meteor burst station on frequencies assigned to the Motor Carrier Radio Service on a secondary non-interference basis. The Commission need not revisit previously considered issues de novo for the purpose of reconsidering its policies each time it receives requests for waiver of the rules.[25] The Commission considered the issues of interference potential from meteor burst communications systems and the propriety of conditional authorizations for such stations in its *Report and Order* in Gen. Docket No. 82-694, *supra*. The Commission, moreover, subsequently upgraded the meteor burst developmental license that was the subject of that proceeding to a permanent unconditional authorization. Transtrack's waiver request, therefore, contained no novel issues, was consistent with the public interest, and was appropriately granted by the Chief of the Private Radio Bureau under delegated authority in accordance with Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

V. CONCLUSION

25. The Commission has determined that meteor burst communications are in the public interest and that frequencies should be made available for their use. Meteor burst systems increase spectrum utilization in that they provide an alternative mode of operation to conventional skywave propagation, microwave or satellite systems.[26] Consistent with this Commission policy, the conditional waiver, granted to Transtrack on a secondary non-interference basis, will encourage the further development

of this new technology without increasing the interference potential to existing Commission licensees. We conclude, therefore, that the Bureau's *Order* granting the waiver necessary to allow Transtrack to operate its AVM meteor burst communications system on a secondary non-interference basis should be affirmed.

26. Accordingly, IT IS ORDERED that MST's Petition for Reconsideration of the grant of Transtrack's request for waiver of Sections 90.89, 90.203, 90.205, 90.239, and 90.250 of the Commission's Rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Order, File No. 73319 (February 12, 1988).

[2] AVM systems use non-voice signaling methods from and to vehicles to track at fixed points the location of the vehicles. AVM systems may also transmit status and instructional messages to the vehicles involved. Section 90.7 of the Commission's Rules. 47 C.F.R. § 90.7.

[3] Meteor burst communications systemsutilize the phenomenon of enhanced radio propagation by reflecting radio frequency (RF) energy (usually in the low VHF frequency range) from a transmitting source off ionized trails of billions of tiny meteors as they enter the earth's atmosphere at altitudes of approximately 100 miles. The height of these meteor trails permits the transmissions to be used for reflected over-the-horizon communications at distances of up to 1,200 miles. *See* 47 C.F.R § 90.7.

[4] Transtrack requested these frequencies because they are low band frequencies that are suitable for meteor burst communications and they are not widely used. *See* note 5, *infra*.

[5] To minimize the interference potential from these high power transmissions, Transtrack has located its base stations in remote, sparsely populated areas in Diana, West Virginia; Tipton, Missouri; Sawmill, Arizona; Haysville, North Carolina; and Park Valley, Utah. Transtrack submitted information that there are no more than nine, and as few as three, man-made structures within one mile of any base station site and that there are only six to fifteen structures within two miles of any base station location. These remote transmitter sites were also selected because they are at least 175 miles from the nearest co-channel licensee.

[6] The mobile units transmit messages of 50 to 108 milliseconds in duration approximately four times per hour.

[7] Transtrack's station is capable of transmitting text messages of up to 32 ASCII characters.

[8] Entities, such as Transtrack, that are primarily engaged in any commercial activity are eligible in the Business Radio Service. 47 C.F.R. § 90.75. Motor Carrier Radio Service eligibility applies to any entity primarily engaged in providing common or contract motor carrier transportation service. 47 C.F.R. § 90.89. As Transtrack does not provide transportation services, its operation on Motor Carrier frequencies requires the waiver of this provision as well as the interim provisions of 47 C.F.R. § 90.239 that govern the frequency assignment and technical standards for AVM systems. The recognized coordinator for the Motor Carrier Radio Service has coordinated Transtrack's use of these frequencies on a non-interference basis.

[9] Transtrack's base station equipment is not type accepted since it operates in the 40 MHz band in excess of the authorized output power specified in Section 90.205 of the Rules, 47 C.F.R. § 90.205. A waiver of this rule section also requires waiver of the type acceptance provisions of 47 C.F.R. § 90.203.

[10] The frequencies 44.20 and 45.90 MHz are allocated for private meteor burst communications system use in the State of Alaska. 47 C.F.R. § 90.250. In the Continental United States these frequencies are assigned to the Motor Carrier and Police Radio Services. 47 C.F.R. §§ 90.19, 90.89.

[11] The Motor Carrier, Public Safety, Police, Highway Maintenance, Forestry-Conservation, Special Emergency, Forest Products, Special Industrial, Business, and Telephone Maintenance Services are authorized to operate within the television IF band. 47 C.F.R. § 90.555. Radio Common Carriers also operate on frequencies within this radio band. 47 C.F.R. § 22.501.

[12] Letter from Victor E. Ferrall, Jr., Esquire, to Richard J. Shiben, Chief, Land Mobile and Microwave Division, February 3, 1988.

[13] Transtrack states that it did extensive testing to ensure that its technical conclusions in this regard are correct. Testing consisted of 2000 watt ERP transmissions from a base station mounted on a truck located in front of a retail television store containing a variety of approximately 100 television receivers in simultaneous operation. The transmissions were in the one-half duplex rather than the full duplex mode so as to increase the interference potential. Interference reportedly occurred when the truck was parked directly in front of the store. At a distance of approximately one quarter of a mile from the store, Transtrack indicates that TVI was eliminated from all but two inexpensive black and white receivers. With respect to these receivers, TVI was noted only on Channel 2. Transtrack represents that no TVI resulted when the source of the transmissions was moved to a distance of approximately three-quarters of a mile from the store.

[14] The free space formula assumes that there is a straight line of sight from the transmitting to the receiving antenna and contemplates no deterioration of signal strength due to the curvature of the earth or topographical obstructions such as buildings, trees or hills.

[15] Plane earth formulas factor in deterioration of signal strength due to natural and man-made obstructions.

[16] Fresnel zone clearance defines an area in which there are virtually no obstructions to interfere with the propagation of a signal.

[17] For example, the United States Air Force Alaskan Air Command uses a meteor burst system to telemeter radar data. There is also an Air Defense Meteor Burst Communications Network covering the Pacific Coast of the United States.

[18] Report and Order in Gen. Docket No. 82-694, 48 Fed. Reg. 34,039 (July 17, 1983). The frequencies 42.40 and 44.10 MHz were allocated for use by common carrier stations in the Rural Radio Service. Private Land Mobile Radio Service stations were assigned the frequencies 44.20 and 45.90 MHz.

[19] *Id.* at 34,041. Under this policy, meteor burst stations are authorized for a one year developmental period during which time the developmental grant is subject to cancellation without hearing by the Commission upon notice to the grantee of TVI problems. If there are no adverse interference consequences, the grantee may file an application for permanent authorization prior to the expiration of the developmental authorization. *See* 47 C.F.R. § 90.250.

[20] ENRON, Inc.'s system uses 500 watt base station transmissions. ENRON's base station, which is located approximately 24 miles from Omaha, Nebraska, has been operating for four years

without adversely affecting television reception in the Omaha market. The frequency 48.68 MHz is assigned to the Petroleum and Forest Product Radio Services. 47 C.F.R. §§ 90.65 and 90.67.

[21] The SNOWTEL system, which has been operational for several years, transmits base stations signals with 1000 watt output power. The frequencies 40.53 and 41.53 MHz are assigned for use by the Department of Agriculture by the National Telecommunications and Information Administration (NTIA).

[22] In its waiver request, Transtrack stated that it needed a full-term, rather than a one year developmental authorization, in order to attract trucking industry support for widespread fleet use of Transtrack's AVM service. Transtrack's license was, therefore, issued on a secondary non-interference basis. Secondary operation is defined as operation that may not cause interference to operations authorized on a primary basis. 47 C.F.R. § 90.7.

[23] *See* para. 6, *supra*.

[24] Transtrack's February 23, 1988, license for WNKZ 640 was granted subject to the express condition that it is "[a]uthorized on a non-interference basis to television reception and existing two way operations granted previous to this operation."

[25] WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[26] Report and Order in Gen. Docket No. 82-694, *supra*, at 34,040.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BENKO BROADCASTING COMPANY — File Nos. BMPCT-870714KE, BMPCT-880114KE

For Extension of Time to Construct
Station WLAJ-TV, Lansing, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1988; Released: November 28, 1988

By The Chief, Video Services Division:

1. Before the staff for consideration are: (a) the above-captioned applications for extension of time in which to construct Station WLAJ-TV, Channel 53, Lansing, Michigan, filed by Benko Broadcasting Company (Benko) on July 14, 1987 (the "July" extension) and January 14, 1988 (the "January" extension); (b) three supplements to the January extension application; (c) a Petition for Reconsideration, filed by Mr. Joel I. Ferguson (Ferguson), seeking reversal of the staff's action of August 17, 1987, granting Benko's July extension application;[1] (d) Benko's opposition to the petition for reconsideration; (e) Ferguson's reply to Benko's opposition; and (f) related pleadings.[2]

PLEADINGS

2. *Petition for Reconsideration.* Ferguson contends that Benko failed in its July extension request to demonstrate the substantial progress in construction that is required to justify an extension of time. More critically, Ferguson argues that Benko's July extension request contained several factual inaccuracies and that these errors comprise a pattern of misrepresentation and lack of candor calculated to mislead the Commission as to the extent of Benko's efforts in constructing WLAJ-TV and to falsely convince the Commission that delays in completing construction of the station were attributable to factors beyond Benko's control.[3] These facts, Ferguson argues, warrant reversal of the staff's grant of Benko's July extension request, cancellation of Benko's construction permit and deletion of its call sign.

3. Ferguson points to various lapses in construction progress that he believes demonstrate the inadequacy of Benko's performance during the six month period immediately preceding the permittee's July extension request. Specifically, Ferguson notes that Benko persisted in its ongoing failure to obtain three-phase or residential electrical service at its transmitter site, thereby forestalling essential work at the site and on the transmitter. Benko also failed to make any progress in increasing the height of its antenna tower and neither leased or constructed a main studio building nor obtained studio or studio-to-transmitter relay equipment for its station.

4. Moreover, Ferguson contends that Benko made several significant misstatements in its July extension request, thereby calling into question its qualifications to hold a Commission authorization. In particular, Benko stated that three-phase electrical service was not yet available at its transmitter site due to an installation delay by Consumers Power Company (Consumers). Ferguson argues, however, that Benko, at the time it made this statement, had not even contacted the power company to arrange service, and that there could be no reasonable basis, therefore, for its attribution to Consumers of the delay in obtaining electrical power. Petitioner further contends that Benko overstated the distance to the nearest three-phase service; Benko asserted in its application that such service was "approximately one mile away", yet Ferguson claims such service was actually available at less than half that distance. Ferguson also questions the legitimacy of Benko's reliance on winter weather conditions as a justification for the delay in further construction of WLAJ-TV's tower, noting that Michigan enjoyed a "mild" winter during 1986-1987.

5. Petitioner argues that Benko's application misled the Commission in several other respects as well. First, Benko referred to "special roof slants" on its transmitter building – in an attempt, in Ferguson's view, to exaggerate the significance of the structure – yet, such slants did not exist at the time the application was submitted. Second, Benko represented that it had been required to clear "woods and brush" at its transmitter site, but Ferguson contends that no such clearing was necessary. Finally, Benko stated in its application that 240 feet of additional tower steel had been delivered to its transmitter site in July 1987. Petitioner asserts, however, that only 126 feet of tower steel was on-site at the time the July extension request was filed.

6. *Opposition.* Benko vigorously disputes the contention that it had not made sufficient progress in constructing WLAJ-TV during the period January to July 1987 to warrant the grant of its July extension request. Benko notes that in this time frame it completed construction of its70,000 transmitter building; finished excavation, foundation pouring and setting of anchor steel for the remaining six guys for its tower; and, took delivery of transmitter equipment valued at approximately500,000, as well as of additional steel tower sections. With respect to main studio facilities, Benko states that it had anticipated leasing studio space in Lansing, but that it has not yet done so. It argues, however, that this fact would not have affected its schedule for completing construction of WLAJ-TV because, in the event leased space were not immediately available, it could have utilized its transmitter building as a main studio. Moreover, Benko contends that there was no need at the time it filed its July extension request to have obtained main studio equipment. Such equipment is easily and quickly obtained, in Benko's view, and "can be properly decided upon later without adversely affecting the station's on-air date." Benko further notes that it would initially require only minimal studio equipment because most of its programming was to be satellite delivered. Finally, Benko objects to the suggestion that its reliance on Michigan's severe winters as grounds for postponing tower work was somehow disingenuous. Benko argues that tower work in Michigan during the winter is, in fact, very difficult, dangerous and expensive and that its decision to defer such work until more favorable conditions prevailed was entirely reasonable. The fact that the

1986-87 Michigan winter may have been milder than usual does not alter this conclusion, Benko contends, because even a relatively mild Michigan winter is a substantial impediment to tower construction.

7. Benko does admit that several of the representations in its July extension request turned out to be innaccurate, but it sharply contests any inference from this fact that it intended to mislead the Commission or that it lacked candor in presenting its request. In this regard, Benko offered the following explanations.

8. With respect to the availability of electrical service at the transmitter site, McLravy -- who prepared Benko's extension request -- asserts that, at the time he filed the application, he believed that electrical service had been ordered by his business associate in building WLAJ-TV, Mr. Robert Benko. Based on this belief, McLravy assumed that the lack of power at the site must be attributable to a delay by the power company in providing service. McLravy acknowledges that both this belief and his derivative assumption concerning the cause of the delay in service were ill founded. He contends, however, that these were honest mistakes resulting from a failure in communications between himself and Mr. Benko as to who was responsible for arranging power to the transmitter site. McLravy states that he believed Mr. Benko would make the appropriate arrangements, while Mr. Benko, in a separate statement submitted with the permittee's opposition to Ferguson's petition, asserts that he believed McLravy would do so. In a related matter, McLravy also admits that his estimate of the distance to three-phase electrical service from the transmitter site may have been erroneous, but argues that his misstatement in this matter does not reflect an intent to misrepresent the facts to the Commission. Rather, McLravy contends that his error here, as with his assumption concerning the delay in providing power to the transmitter site, simply reflected his lack of personal involvement in the electrical service aspect of the station's construction.

9. With regard to the "roof slants" on WLAJ-TV's transmitter building, Benko recognizes that the wording of its statement in its July extension request might have been taken to suggest that these items, designed to protect the transmitter's heat exchanger, were already in place, when, as Benko acknowledges, they were not. Benko asserts, however, that its statement was not intended to mislead the Commission as to the state of construction of the transmitter building. The forthright nature of its intention in this matter, Benko contends, is convincingly demonstrated by the fact that it attached to the July extension request a photograph of the transmitter building which clearly showed that the roof slants had not yet been installed. Moreover, Benko notes that it still intends to provide this slanted roofing. Turning to the question of the need to clear "woods and brush" at its transmitter site, Benko argues that it did not state in its extension application that such clearance was necessary to provide "a path to the transmitter site", as Ferguson contended in his petition. Rather, the clearing of woods and brush was needed in connection with with the pouring of footings for tower guys and to provide clearance for the guy lines to the tower.

10. Finally, as to the number of feet of additional tower steel delivered to the transmitter site, Benko acknowledges that 120 feet, not 240 feet as originally stated in the extension application, was delivered. This mistake, Benko argues, resulted from a reasonable, but erroneous, assumption on McLravy's part. All 240 feet of the tower was scheduled to be delivered by the tower manufacturer and when McLravy learned that a delivery had been made to the site, he assumed it was the scheduled delivery. Neither he, nor the contractor erecting the tower, was aware that the tower manufacturer had elected to supply only half of the scheduled number of feet and to provide the remaining 120 feet soon thereafter.

11. *Reply*. In reply, Ferguson concedes that there was some "last minute" progress in the construction of WLAJ-TV prior to the filing of the July extension request, but argues that it was inadequate to warrant the grant of the extension, particularly where Benko has failed to arrange for the cleaning, testing and assembly of its transmitter and has not explained the lack of tower progress between April and May, 1987, when the tower site was both dry and free of cold-weather risks. Ferguson also questions Benko's intention to use its small, unheated transmitter building as a main studio during WLAJ-TV's initial operations and its failure to arrange for essential studio or satellite equipment for the station. With respect to the clearance of "woods and brush" at WLAJ-TV's transmitter site, petitioner reasserts its contention that no such clearance was needed, either to gain access to the transmitter site or in connection with the guys and anchors for the tower.

12. Ferguson characterizes as incredible Benko's explanation of its admittedly mistaken assertion that the power company had delayed the installation of electrical service to WLAJ-TV's transmitter site. Ferguson notes that Robert Benko, on whom McLravy claimed in his 1987 request to be relying to obtain power, had last contacted the power company on Benko's behalf in 1984 -- more than two years earlier. Two subsequent contacts with the power company concerning electrical service to Benko's site, in 1985, were made not by Robert Benko, but by a Mr. Scott Campbell, an employee of one of McLravy's companies. Under these circumstances, Ferguson argues, McLravy's claim that he had assumed Robert Benko would arrange for power is simply not believable. Ferguson concludes that Benko's July extension request does not reflect an innocent misstatement, premised on a series of errant assumptions, but a direct misrepresentation of critical facts. Moreover, recalling Benko's erroneous assertions concerning the distance to three-phase power, the number of feet of tower steel delivered, and the installation of roof "slants", Ferguson contends that a pattern of misrepresentation, not isolated errors, emerges from Benko's July extension request. Whether intentional or negligent, Ferguson argues that these misrepresentations raise serious doubt about Benko's qualifications to remain a Commission permittee.

13. *Pending Extension of Time Application*. On January 14, 1988, Benko filed a further request for extension of time in which to construct WLAJ-TV. Benko indicated that, during the immediately preceding six-month period, further construction progress had been made as follows: an additional 60 feet of tower was erected, bringing total tower height to 180 feet; tower completion was scheduled for June 1988; a consulting engineer began off-site refurbishing of the transmitter; Multi-Sat was actively engaged in construction of WLAJ-TV's antenna, with delivery scheduled for early June 1988; negotiations were initiated to obtain the necessary transmission line for the station; the contract for electrical wiring of the transmitter building was let; and, initial contacts with program suppliers

were made. Benko stated that delays in electrical service to its transmitter site continued, due primarily to right-of-way difficulties encountered by the power company, but that three-phase power was on order and that single-phase service had been requested on an interim basis to permit on-site transmitter work and tower lighting. Finally, Benko stated that it would initially operate from its transmitter building, with minimal studio equipment. The equipment that will be required, Benko observed, was available on very short notice and would be ordered approximately two months before WLAJ-TV's then-anticipated on-air date of June 1, 1988.

14. In a February 1988 supplement to its extension request, Benko asserted that it had expended more than30,000 on further construction in the preceding 60-day period, but that additional tower progress had been forestalled by the lack of electrical power to light the tower -- a Federal Aviation Administration requirement when the tower exceeds 200 feet. Benko stated that the continuing delay in obtaining electrical service was a result of scheduling problems at the power company. The permittee noted that it had already paid for the electrical service and that it was expected that power would be installed by the end of February 1988. On March 24, 1988, Benko filed a further supplement to its application, attaching a letter from Consumers Power Company indicating that inclement weather conditions had precluded the use of equipment necessary to complete the installation of electrical service at WLAJ-TV's transmitter site. Benko projected, however, that service would be available within a week after weather conditions permitted resumption of work. Benko also asserted that it had spent an additional40,000 in construction since its February progress report and that, in the absence of electrical service, it anticipated lighting the tower with a generator to permit work on the structure to proceed. Finally, on April 11, 1988, Benko filed a third supplement to its pending extension request. It noted that an additional 160 feet of tower had been erected, bringing the tower to a total height of 340 feet; that additional tower steel was on the ground at the transmitter site; that Consumers Power Company expected completion of its installation work by April 30, 1988; and, that Benko projected a new on-air date of September 1, 1988.

15. *Staff Letter of Inquiry*. On April 27, 1988, the staff directed a letter to Benko requesting that it clarify several matters raised in the above pleadings. The letter posed four specific inquiries. First, Benko was asked to provide a "detailed explanation of the basis for McLravy's 'assumption' that the unavailability of electrical service was attributable to the affirmative act of Consumers Power Company." Second, the letter noted Benko's assertion in its pending extension request that a "consulting engineer is refurbishing the transmitter" and requested that this statement be reconciled with Benko's contention in its July extension request that the lack of power at the transmitter site had precluded "cleaning, testing and assembly" of the transmitter. Third, the staff sought clarification of the causes of a further delay -- between November 1987 and February 1988 -- in obtaining electrical service at WLAJ-TV's transmitter site. In the February 1988 supplement to its pending extension request, Benko attributed this delay to the power company, yet there was some indication that it could have resulted from Benko's failure to pay certain construction charges and an unwillingness to defray winter construction surcharges imposed by the power company. Finally, the letter requested information concerning the availability of, and installation schedule for, satellite signal receiving and processing equipment that Benko had indicated would be critical to its initial operations.

16. Benko responded to the staff's inquiry on May 27, 1988.[4] Benko reiterated its contention that a "gap in communications" between McLravy and Robert Benko was responsible for the erroneous statement in its July extension request concerning the cause of the delay in obtaining electrical service at WLAJ-TV's transmitter site. Benko explained that Robert Benko had been responsible for transmitter site improvements, including contacts with the power company, in the early stages of the station's construction in 1984. McLravy assumed that this initial division of responsibility was still in effect when construction of the station was recommenced in 1986, after a one-year hiatus occasioned by a zoning dispute. Robert Benko, on the other hand, had assumed that responsibility for site improvements had shifted to McLravy. Extending his initial assumption, McLravy further assumed that Robert Benko had, in fact, ordered electrical service and concluded that the lack of power at the transmitter site could only be the result of a delay by Consumers. Benko concedes that McLravy's assumptions were incorrect, but contends that they were logical and do not reflect an intent to misrepresent facts to the Commission.

17. With respect to the refurbishing of WLAJ-TV's transmitter, Benko states that the off-site preparation work referenced in its current extension request is not the same as the "cleaning, assembly and testing" of the transmitter noted in its July extension request. Both of these efforts were necessary, Benko argues, but only the latter required electrical power at the site. The former involved various design and fabrication efforts -- such as the construction of new filters -- that could be and were performed elsewhere. As to the electrical service delay encountered between December 1987 and February 1988, Benko contends that this was not a result of its unwillingness to pay winter construction surcharges; rather, it was largely a direct consequence of a work backlog at the power company. Benko attaches a letter from Consumers verifying the permittee's account of this matter and indicating that electrical service construction work by the power company had been completed. Finally, Benko asserts that its satellite reception equipment will consist of a "Prodlin trackable, polar-mounted C-band downlink from Michigan Microtech", which is available on 10-days notice and "can be installed and made operational within seven days after delivery." Accordingly, Benko states that it does not intend to order this equipment until six weeks prior to its projected on-air date.

DISCUSSION

18. *Petition for Reconsideration*. Section 73.3534(b) of the Commission's Rules provides, in relevant part, that a construction permit will be extended if either (a) substantial progress has been made, or (b) no progress has been made for reasons clearly beyond the control of the permittee and the permittee has taken all possible steps to resolve outstanding problems and proceed with construction.[5] We are not persuaded by Ferguson's contention that Benko failed, during the January-July 1987 period at issue here, to satisfy these criteria. While certain important aspects of WLAJ-TV's construction remained unfinished,

particularly the provision of electrical service and completion of the tower, other significant steps in constructing the station were taken, including completion of a70,000 transmitter building and delivery of WLAJ-TV's transmitter equipment, valued at approximately500,000. Guy anchor preparations for the tower were also completed during this period and an additional 120 feet of tower steel was acquired. Moreover, we find Benko's stated intention to utilize its transmitter building as a studio during initial operations of the station to be reasonable, given the primarily satellite-delivered nature of its proposed programming. It does not appear, therefore, that Benko's failure to lease or construct separate studio facilities delayed WLAJ-TV's on-air date. Similarly, we find credible Benko's contention that satellite equipment needed to implement its stated programming plans is available on short notice and that Benko's decision not to order or obtain such equipment during the six months prior to its July extension request did not effectively impede placing WLAJ-TV in service. Finally, while weather conditions in Michigan may not have precluded further tower construction by Benko during the winter of 1986-87, we accept as reasonable the permittee's decision to defer such work based on weather considerations, particularly where other significant progress was made during the construction term.[6] In connection with Benko's tower progress, we also note the permittee's unrebutted assertion that wet conditions at its transmitter site in the spring of 1987 exacerbated the winter delays. In view of the foregoing, we cannot, as Ferguson suggests, fairly characterize Benko's efforts and accomplishments during the pertinent construction period as insubstantial. On the contrary, Benko appears both to have achieved considerable progress in actual construction of the station and to have demonstrated a serious financial commitment to that objective. Section 73.3534(b) does not require more.

19. We turn now to Ferguson's allegation that Benko's July extension request misrepresented critical facts to the Commission. In evaluating this charge, we first take note of the Commission's recent restatement of the applicable standard in such cases. "A necessary element in misrepresentation is wilfulness. *Bluegrass Broadcasting Co.*, 43 F.C.C. 2d 990, 993 (1973). Carelessness, exaggeration or slipshodiness, which lack that necessary element, do not constitute misrepresentation. *John C. Roach*, 43 F.C.C. 2d 685, 689 (Rev. Bd 1973)." *F. B. C. Incorporated*, 3 FCC Rcd 4595, 4597 (1988). Under this criterion, we cannot find that Ferguson has established that Benko made misrepresentations to the Commission in connection with its July extension application. Rather, for the reasons noted below, we conclude that the various misstatements in Benko's extension request are more likely the consequence of carelessness than a willful intent to deceive.

20. Benko admits that its July extension application erred in attributing the delay in obtaining electrical service at its transmitter site to the power company and in overstating both the distance to three-phase power at the site and the number of feet of additional tower steel on hand when its request was filed. Benko contends, however, that none of these assertions were intended to mislead the Commission; they were, instead, simple mistakes. We accept Benko's explanation. McLravy's statement that he assumed Robert Benko was arranging for electrical service to WLAJ-TV's transmitter site is plausible, given Robert Benko's initial responsibility for, and actions taken with regard to, this aspect of the project. Moreover, it is not unreasonable to conclude, as Benko suggests, that the year-long interruption in station construction which followed early building efforts -- the result of a zoning dispute -- contributed to the misunderstanding between McLravy and Robert Benko concerning the division of responsibility for obtaining electrical service.[7] McLravy's second assumption, that because power had been ordered by Robert Benko, the continuing unavailability of service must have been the result of a delay by the power company, was also logical. With respect to Benko's admitted half-mile error in estimating the distance to three-phase power at WLAJ-TV's transmitter site, we believe it quite improbable that Benko would have undertaken to deceive the Commission, and risked the severe penalties such deception could involve, over such a trivial exaggeration. Whether power was one mile or one half-mile distant would not likely have altered the Commission's view of Benko's extension application. Thus, there would have been little to gain and much to lose from an intentional misstatement of this nature and we are reluctant, absent direct evidence not present here, to conclude that such a deception occurred. Finally, we find credible Benko's explanation of its error concerning the number of feet of tower steel on hand in July 1987. It is undisputed that 240 feet of steel was scheduled for delivery and that a delivery did, in fact, take place. Benko's assumption that the entire scheduled load of steel was delivered was, therefore, reasonable. Under these circumstances, we cannot conclude that Benko's misstatement reflected a willful attempt to mislead us.

21. Benko does not concede that it misstated the facts in connection with the "roof slants" planned for its transmitter building. It does admit, however, that the wording of its extension request concerning this matter may have erroneously implied that these "roof slants" were already in place. The permittee's simultaneous submission with its July extension application of a photograph of the transmitter building, revealing the absence of the "roof slants," adequately rebuts, in our view, the suggestion that Benko's statement on this issue was intended to deceive the Commission.[8]

22. We conclude that Ferguson has not established a basis, either under Section 73.3534(b) of the Rules or on basic qualifications grounds, for reversing the staff's grant of Benko's July extension application. Accordingly, Ferguson's petition for reconsideration will be denied. We note, however, that while Benko's pleadings in this proceeding do not constitute misrepresentation under the standard referenced above, they do reflect a level of carelessness in pleading that we seek to discourage. The Commission places great reliance on the accurate and candid nature of parties' representations and cannot tolerate persistent inattention to precision in pleading. We admonish Benko, therefore, to exercise greater care in the future in reporting facts to the Commission.

23. *Pending Extension of Time Request.* It remains to consider Benko's pending application for a further extension of time in which to construct WLAJ-TV. We note that this request is unopposed by Ferguson or any other party. After careful review of Benko's pleadings, we conclude that the permittee has made substantial additional progress in constructing WLAJ-TV and has demonstrated that further delays in bringing the station to completion were in some measure due to circumstances beyond its control. Accordingly, we find that a further extension of time is warranted.

24. By April of this year, Benko states that it had constructed an additional 160 feet of tower, bringing total tower height to 340 feet, and that it had additional tower steel on hand. Further, Benko contends that it expended an additional70,000 in constuction of WLAJ-TV during the period December 1987 to March 1988, and submits copies of its checks to document this fact. Benko also asserts that Consumers Power Company has been responsible for further delays in providing electrical service to the station's transmitter site, thereby forestalling some essential construction efforts. In this regard, the permittee appends a letter from the power company attesting to the weather-related difficulties the company has encountered in providing service. In its May 1988 response to the staff's letter of inquiry, however, the permittee notes that electrical service construction work by the power company had been completed. Benko's pleadings further establish that its transmitter is being refurbished and that its antenna is under active construction.

25. In view of the foregoing, we are persuaded that WLAJ-TV's completion is imminent and that a final extension of time to build the station will serve the public interest by enabling the permittee to bring to fruition a long and difficult construction effort. The permittee is cautioned, however, that construction is expected to be completed within the time provided herein.

26. Accordingly, IT IS ORDERED That, the Petition for Reconsideration filed by Mr. Joel I. Ferguson IS DENIED, and the staff action granting the application (BMPCT-870714KE), filed by Benko Broadcasting Company on July 14, 1987, for an extension of time in which to construct Station WLAJ-TV, Lansing, Michigan, IS AFFIRMED.

27. IT IS FURTHER ORDERED That, the pending application (BMPCT-880114KE) of Benko Broadcasting Company for extension of time in which to construct Station WLAJ-TV, Lansing, Michigan, IS GRANTED, and Benko's construction permit IS EXTENDED until six months from the date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Video Services Division

FOOTNOTES

[1] Ferguson, a Lansing resident, asserts standing to file the subject petition for reconsideration notwithstanding his failure to file in opposition to the underlying extension application. Benko argues that Ferguson lacks standing because he has not demonstrated good reason, as Section 1.106(b)(1) of the Commission's Rules requires, for not participating at an earlier stage in the proceeding. Ferguson responds that the short time between Benko's application and its grant by the Commission and the need to collect information to document his allegations justify the timing of his pleading. Ferguson also notes that his petition was filed well within the time allowed for reconsideration petitions. The issues raised by petitioner are significant and relevant to our determination concerning Benko's pending application for a further extension of time (the January request), as well as to our earlier grant of Benko's July extension request. Accordingly, without deciding whether Ferguson has demonstrated "good reason" for not participating earlier, we will consider his petition.

[2] Among these related pleadings was a request by Benko for a temporary waiver of Section 73.3555(b) of the Commission's Rules governing common ownership of attributable interests in radio and television stations serving the same market. Benko's request sought authorization for its principal stockholder, Mr. R. Charles McLravy, to retain his then-existing, attributable interests in radio stations WILS and WILS-FM, both licensed to Lansing, while maintaining his controlling interest in WLAJ-TV. Benko subsequently withdrew this request, however, indicating that McLravy was terminating his interests in the radio stations. On August 12, 1988, the Commission granted a transfer of control application (BTC-880608HC) that would divest McLravy of his interests in WILS and WILS-FM.

[3] Ferguson also notes that Benko's July extension application was filed one day prior to the expiration of its existing permit, notwithstanding the provisions of Section 73.3534(a) of the Commission's Rules which require, absent a showing of good cause, that such applications be filed "at least 30 days prior to the expiration date of the construction permit. . . ." Benko's application was properly considered. *See F. B. C. Incorporated*, 3 FCC Rcd 4595, 4597 (MMB 1988).

[4] Although he was afforded an opportunity to reply to Benko's response to the staff's letter, Ferguson elected not to do so.

[5] 47 C.F.R. Section 73.3534(b).

[6] Ferguson appears to argue that, irrespective of the degree of progress a permittee otherwise demonstrates, an extension of time to construct is justified only if all significant aspects of station construction which fail of completion are shown to have been delayed by reasons entirely beyond a permittee's control. To the extent Ferguson so contends, we do not consider its position to reflect the rule's requirements accurately.

[7] The fact that Campbell twice contacted the power company subsequent to Robert Benko's initial contact in 1984 does not, as Ferguson suggests, significantly undermine the plausibility of McLravy's statement of his assumptions. Campbell's contacts were both minor in nature -- they simply informed the power company that Benko was not proceeding with its construction efforts due to the zoning dispute -- and they both occurred before the lengthy disruption of the construction process.

[8] The parties continue to dispute the extent of and necessity for the clearance of "woods and brush" at WLAJ-TV's tower site, although there seems to be some confusion on their part as to precisely what each side has contended on this question. Given the failure of the parties to effectively join this issue and the relative insignificance of the clearing question to the staff's prior action, we do not believe that we need to consider this matter further.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 28, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AN AMENDMENT TO BELLSOUTH'S PLAN TO OFFER CEI FOR A GATEWAY SERVICE

On November 2, 1988, the Bell South Operating Companies, South Central Telephone Company and Southern Telephone and Telegraph Company (BellSouth), filed an amendment to their Comparably Efficient Interconnection (CEI) plan for gateway servicies, originally filed on April 20, 1988 (*See* Pleading Cycle Established for Comments on BellSouth's Plan to Offer CEI for Gateway Services, Public Notice, 3 FCC Rcd 2697 (1988)). BellSouth states a belief that the Commission has not acted on its CEI plan because some of the issues it raises are similar to those pending in the Open Network Architecture (ONA) proceeding, CC Docket No. 88-2. Therefore, BellSouth proposes to amend its CEI plan as follows:

1. Gateway service providers, both existing and new, may continue to obtain network services from state tariffs as they currently do. In other words, gateway service providers would not be required to obtain their current network services from a new separate state tariff section;

2. As an option to existing tariffed services, there would be a separate state tariff section that contains both new and newly unbundled network capabilities. These network services would be made available to all local exchange customers on an optional basis, including interexchange carriers that use those facilities to provide enhanced services; and

3. BellSouth would modify its customer proprietory network information (CPNI) notice and response forms to conform with those that the Bureau previously approved in the *BOC CPE Structural Relief* proceeding, CC Docket 86-79.

According to BellSouth, its CEI plan, as amended, also provides greater specificity about the aspects of its electronic mail and computer storage features, and goes beyond the Commission's CEI requirements. BellSouth also notes that, except as expressly amended in this filing, its CEI plan for gateway services remains, in all respects, as described in its plan currently on file with the Commission.

Interested parties should file comments on this petition by **December 12, 1988,** and reply comments by **December 20, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of BellSouth's amendment can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-506

In the Matter of

Amendment of Section 73.202(b), RM-5850
Table of Allotments,
FM Broadcast Stations.
(Apache Junction, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 4, 1988; Released: November 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 2 FCC Rcd 6915 (1987), issued in response to a petition filed by Beta Communications, Inc. (petitioner), licensee of Station KVVA-FM,[1] Channel 296A, Apache Junction, Arizona, proposing the substitution of Channel 296C2 for Channel 296A and modification of its licenses accordingly. Petitioner filed comments in support of the proposal. Additionally, The Alpha Group, Inc., licensee of Station KXMK(FM), Channel 292A, Arizona City, Arizona, filed comments, to which petitioner responded.[2]

2. We believe the public interest would benefit by substituting Channel 296C2 for Channel 296A at Apache Junction, Arizona, since it could provide the community with its first expanded coverage area broadcast station. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KVVA-FM to specify operation on Channel 296C2 in lieu of Channel 296A, as requested. A staff engineering analysis reveals that Channel 296C2 can be allotted to Apache Junction in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 9 kilometers east [3] of the community to avoid short-spacing to Channel 295A at Buckeye, Arizona.[4] Since Apache Junction is located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence in the proposal by the Mexican government was obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 12, 1989** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Apache Junction, Arizona	296C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Beta Communications, Inc. Station KVVA-FM, IS MODIFIED, effective **January 12, 1989,** to specify operation on Channel 296C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the Licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly Station KSTM(FM).

[2] Alpha's comments seek the consolidation of this proposal with its request to change the operating channel of Station KXMK(FM) at Arizona City, Arizona, in MM Docket No. 87-543. However, as that proposal has recently been denied for reasons unrelated to the pendency of petitioner's proposal *(see Report and Order* adopted November 4, 1988), its comments are moot and merit no discussion herein.

[3] An 8.0 kilometer east site restriction announced in the *Notice* was taken from petitioner's engineering statement. According to our engineering analysis, utilizing the petitioner's suggested site at coordinates 33-23-49 and 111-27-16, the transmitter would be located 9 kilometers east of the community.

[4] Channel 295A was allotted to Buckeye in MM Docket No. 84-231, and was the 77th channel opened for applications. During the window filing period, two applications were filed for Channel 295A (880728MZ, at coordinates 33-26-11 and 112-36-17, and 880728NE, at coordinates 33-27-46 and 112-35-13), both of which are compatible with the 9 kilometer east site restriction at Apache Junction.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-543

In the Matter of

Amendment of Section 73.202(b), RM-5817
Table of Allotments,
FM Broadcast Stations.
(Arizona City, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 4, 1988; Released: November 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 7385 (1987), issued at the request of the Alpha Group (Alpha), licensee of Station KXMK(FM), Arizona City, Arizona. Alpha seeks the substitution of Channel 293C2 for its existing Channel 292A, or, alternatively, the substitution of channel 293A for Channel 292A. Alpha and Arizona Lotus Corp. (Lotus), licensee of Station KLPX(FM), Tucson, Arizona, filed comments.[1] Alpha filed reply comments.

2. In the *Notice*, we indicated that Alpha's proposal to substitute Channel 293C2 for Channel 292A was unacceptable because Channel 293C2 at Arizona City requires a 43.1 kilometer site restriction to clear Station XHSN-FM, Channel 294C, Nogales, Sonora, Mexico. Because the greatest distance a Class C2 station may be located from its city of license and still be expected to provide the required city grade signal is 32.6 kilometers, we did not propose to substitute Channel 293C2 for Channel 292A. Instead, we proposed to substitute Channel 293A for Channel 292A, as alternatively requested by Alpha.

3. In its comments, Alpha argues that the short spacing between its Class C2 proposal and the Class C station at Nogales is a result of the fact that, under the U.S. Mexican Agreement, Class C2 stations must be coordinated with Mexico as if they were full Class C stations. Alpha states its understanding that a future agreement with Mexico will, in all likelihood, include Class C2 stations. Alpha requests deferral of further action in this proceeding pending conclusion of negotiations with Mexico.

4. In its comments, Lotus addresses only the proposed substitution of Channel 293A for Channel 292A. Lotus disputes Alpha's contention that the channel substitution is necessary to avoid interference to Station KONC-FM at Sun City, Arizona. Lotus notes that Alpha's Station KXMK is fully spaced to KONC-FM, but is not fully spaced to a translator Station K292CM at Summerhaven, Arizona. Lotus states that the licensee of K292CM, Double Eagle Broadcasting, is owned by C. R. Crisler, Alpha's consultant. Lotus notes that Alpha and Lotus jointly opposed several applications filed by Double Eagle for assignment or modification of K292CM, based in part on interference to KXMK from the translator. Lotus notes, however, that in October of 1987, Alpha "broke rank" and withdrew its objections.

5. Lotus contends that, to the extent Alpha's petition is designed primarily to preserve Crisler's translator through rule making, it seeks an improper end through improper means. Lotus contends that the proposed change in channels and modification of Alpha's license would violate the Supreme Court's decision in *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). Lotus notes that, unlike the normal case involving the procedures set forth in the Commission's rules for the simultaneous change in an allotment and modification of an existing licensee's or permittee's authorization, Alpha's proposal would not result in the upgrading of service to the public, but would instead disserve the public interest. Under such circumstances, Lotus contends, shielding a licensee from competing applications, should a new channel be allotted, cannot be justified.

6. In its reply, Alpha does not address the substantive issues raised by Lotus. Instead, Lotus details the apparently rancorous relations between Alpha and Lotus immediately following Alpha's "breaking rank." Alpha characterizes Lotus' objections as an abuse of the Commission's processes, aimed at retribution only. Alpha contends that Lotus is attempting to relitigate the merits of its complaints against K292CM, and to forestall competition. Alpha states that the simple move from Channel 292A to Channel 293A has never been Alpha's ultimate objective, because Alpha's primary interest is in an upgrade to Channel 293C2.

7. Alpha's request for an upgrade to Channel 293C2 will be denied. Alpha is under the mistaken impression that requests for Class C2 allotments in the Mexican border region are treated as Class C allotments when coordinating Class C2 allotment requests with the Mexican government. In fact, the Commission treats Class C2 proposals as Class B proposals for purposes of coordination, because power and height maxima for Class B and C2 stations are identical. Our discussion in the *Notice* assumed coordination of Alpha's request as a Class B station, and found that it would not be possible to provide city grade service to Arizona City from a site complying with the Commission's minimum distance requirements.[2] Moreover, we do not believe it appropriate to defer action on Alpha's request based on the possibility that a new Agreement regarding FM broadcasting will be reached in the future. The existing Agreement provides an adequate mechanism for the coordination of Class C2 proposals, any new Agreement would be prospective in application only, and there is no guarantee that Alpha's proposal would prove acceptable under the new Agreement.

8. Alpha's request for the substitution of Channel 293A for Channel 292A, and modification of its license accordingly, will be denied. We do not believe, as Lotus asserts, that the substitution and modification of license would affirmatively harm the public interest. However, on the record before us we are unable to conclude that the requested substitution would affirmatively benefit the public interest.

9. Alpha suggested two reasons for its request. First, Alpha submits that its ultimate goal in this proceeding is not the simple Class A for Class A substitution, but instead an upgrade to a Class C2 station. Alpha is free to seek that upgrade if it becomes possible at a later date. However, the substitution of Channel 293A for Channel

292A does not in any way facilitate a future request for an upgrade. Therefore, we find that Alpha's first stated reason is inadequate to support a finding that the substitution would serve the public interest.

10. Second, in its original petition for rule making, Alpha noted the existence of interference from co-channel full service stations, but did not provide any evidence to support its claim. In its comments, Alpha did not state its intention to implement the proposed Class A for Class A substitution. In its comments, Lotus argued that KXMK is fully spaced to all co-channel full service stations, and that the true source of interference is not full service stations, but translator K292CM. In its response, Alpha did not provide any substantiation of its claim of interference from full service stations, and stated that its primary aim is to obtain an upgrade. Therefore, we are unable to find that the interference Alpha seeks to eliminate is from co-channel full service stations. In addition, Alpha has not stated its intent to implement the substitution. Accordingly, we reject Alpha's second reason for requesting the channel substitution.

11. Because we are unable to make a finding that the alternative channel substitutions proposed by Alpha would serve the public interest, Alpha's petition for rule making will be denied.

12. Accordingly, IT IS ORDERED, That the petition for rule making filed by the Alpha Group to substitute Channel 293C2 or Channel 293A for Channel 292A at Arizona City, Arizona (RM-5817), IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Lotus filed a motion for acceptance of its late-filed comments, explaining that its comments were filed one day late because its counsel, as part of a merger with another firm, had directed the telephone company to disconnect telephone lines between its New York and Washington offices, and that the telephone company executed that request one day early, thereby preventing transmission of Lotus' comments in time for filing at the Commission. Lotus submits that no party would be prejudiced by acceptance of its late-filed comments, because it undertook to serve all parties by hand delivery or overnight courier. We believe that since petitioner had actual notice of Lotus' comments and responded to matters raised therein, consideration of the late-filed comments is permissible.

[2] The present Class B to C separation requirement under the U.S. Mexican Agreement is 215 kilometers (135 miles) for first adjacent channels. *See* 47 CFR § 73.207(b)(3). Petitioner's specified site, at coordinates 32-50-04 and 111-38-15, is 179 kilometers from Station XHSN at Nogales, at coordinates 31-19-51 and 110-56-45. It is, therefore, short spaced by 36 kilometers to the Mexican station. Even under the domestic Class C2 to C first adjacent channel separation requirement, 188 kilometers (117 miles), petitioner's proposed site is 9 kilometers short spaced to Station XHSN.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-532

In the Matter of

Amendment of Section 73.202(b), RM-6415
Table of Allotments,
FM Broadcast Stations.
(Yazoo City, Mississippi and
Rayville, Louisiana)

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: October 28, 1988; Released: November 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is a petition for rule making filed by St. Pe' Broadcasting, Inc. (petitioner), requesting the substitution of FM Channel 221C2 for Channel 221A at Yazoo City, Mississippi. Petitioner also requests modification of its license for Station WJNS(FM), to specify operation on the higher class channel.

2. Channel 221C2 can be allotted to Yazoo City, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 221A is deleted from Rayville, Louisiana.[1] Petitioner has proposed the substitution of Channel 222A for 221A at Rayville. The proposed substitution at Rayville can be accomplished in compliance with the minimum distance separation requirements at the current site of Station KTJC(FM), Rayville.[2] Thus, we shall issue an Order to Show Cause to Delta Communications, Ltd., the licensee of Station KTJC(FM). Since 221C2 is an adjacent channel upgrade, the modification at Yazoo City could take place in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require that the proponent of the new allotment make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has indicated its willingness to reimburse the licensee of Station KTJC(FM) for its costs in implementing the change in frequency in accordance with Commission policy.

4. In view of the fact that the proposed allotment could provide a first wide coverage area station at Yazoo City, Mississippi, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Rayville, Louisiana	221A	222A
Yazoo City, Mississippi	221A, 229A	221C2, 229A

5. IT IS ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, Delta Communications, Ltd., licensee of Station KTJC(FM), Rayville, Louisiana, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 222A in lieu of Channel 221A.

6. Pursuant to Section 1.87 of the Commission's Rules, Delta Communications, Ltd. may not later than **January 20, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. The Commission may call on Delta Communications, Ltd. to furnish additional information. If Delta Communications, Ltd. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Delta Communications, Ltd. will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Order to the following:

Delta Communications Ltd.
Station KTJC(FM)
$1207^{1/2}$ Louisa St.
Rayville, Louisiana 71269

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **January 20, 1989,** and reply comments on or before **February 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy K. Brady
P.O. Box 986
Brentwood, Tennessee 37024-0986
(Counsel for the petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 221C2 at Yazoo City are 33-03-57 and 90-35-01.

[2] The coordinates for Channel 222A at Rayville are 32-27-22 and 91-39-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-451

In the Matter of

Amendment of Section 73.202(b),	RM-5631 RM-5695
Table of Allotments,	RM-5639 RM-5763
FM Broadcast Stations.	RM-5647 RM-6238
(Cordova, Demopolis, Evergreen,	RM-5655 RM-6239
Hartselle, Linden, Marion,	RM-6240
Sheffield, Trinity, and Tuscaloosa,	
Alabama; Columbus, Mississippi[1])	

REPORTAND ORDER
(Proceeding Terminated)

Adopted: November 1, 1988; Released: November 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 6514 (1987), soliciting comments on six mutually exclusive petitions for rule making, involving eight communities. The proposals set forth in the *Notice* are:

(A) Substitute Channel 225C2 for Channel 224A at Tuscaloosa, Alabama, and modify the license for Station WTUG(FM), at the request of Radio South, Inc. (RSI) to provide that community with its second expanded coverage FM service (RM-5647). In order to accommodate this change, RSI requested the substitution of Channel 223A for Channel 225A at Cordova, Alabama, and the substitution of Channel 291A for Channel 223A at Trinity, Alabama, for which seven applications are pending.[2]

(B) Substitute Channel 226C2 or 253C2 for Channel 296A at Linden, Alabama, and modify the permit for Station WDAL(FM), as requested by Marengo County Broadcasting, Inc.[3] (MCB) to provide that community with its first wide coverage area FM service. Since this proposal involves modification to a non-adjacent channel, Channel 253C2 was offered as an additional equivalent channel in the event of other interests (RM-5639).

(C) Substitute Channel 226C1 for Channel 280A at Marion, Alabama, and modify the permit for Station WJAM(FM), at the request of Marion Radio, Inc. (MRI), to provide that community with its first wide coverage area FM service (RM-5695).

(D) Substitute Channel 227C2 for Channel 228A at Evergreen, Alabama, and modify the license of Station WIJK-FM[4] to provide that community with its first wide coverage area FM service, as requested by Wolff Broadcasting Corporation (WBC) (RM-5763).

(E) Allot Channel 291A to Hartselle, Alabama, as that community's first FM service, as requested by Radio Hartselle (RH) (RM-5631).

(F) Substitute Channel 293C2 for Channel 292A at Demopolis, Alabama, and modify the license for Station WZNJ(FM) to provide that community with its first wide coverage area FM service, as requested by Southstar Communications, Inc. (SCI) (RM-5655).

All parties filed comments in support of their respective proposals. WCPC Broadcasting Company, Inc. (WCPC), licensee of Station WCPC-FM, Channel 277C1, Houston, Mississippi, Morgan Broadcasting, Inc. (MBI), an applicant for Channel 223A at Trinity, and Shelly Broadcasting Company (SBC) also filed comments.[5] RSI and Paul Slatton and Associates Broadcasters (Slatton) (RM-6238 and RM-6239) filed counterproposals.[6] MRI, T&W Communications, Inc. (T&W), and Butler Broadcasting Corporation (BBC) (RM-6240), filed a joint counterproposal. RSI, RH, SCI, Slatton, WCPC, and Oxford Radio, Inc. (ORI), licensee of Station WKLJ(FM), Channel 296A, Oxford, Mississippi, filed separate reply comments, and MRI, T&W and BBC filed joint reply comments. T&W also filed a clarification to its reply comments. RSI,[7] RH, and Slatton filed individually, and MRI, T&W and BBC jointly, in response to the counterproposals. In addition, Slatton and RH filed Joint Supplemental Comments. RSI, MCB, T&W, WBC, WCPC, and SCI filed a Joint Request for Expedited Action, John F. White (White) filed Reply Comments and Request for Severance, and Colon Johnson (Johnson) filed comments.[8] Various citizens of Parrish, Townley, Cordova and Jasper, Alabama, filed informal comments.[9]

2. The proposals are related to each other as follows:

(a) *Tuscaloosa (Channel 225C2) (RM-5647):* The proposal to modify the facilities of Station WTUG(FM) from Channel 224A to Channel 225C2, which requires the substitution of Channel 223A for 225A at Cordova, Alabama, and the Cordova substitution, which in turn requires the substitution of Channel 291A for Channel 223A at Trinity, could be accommodated in conformity with Section 73.207(b) of the Commission's Rules, provided certain site restrictions were imposed.[10] However, the proposed allotment of Channel 225C2 to Tuscaloosa conflicts with the proposal to substitute Channel 226C2 for Channel 296A at Linden and to modify Station WDAL(FM) accordingly (RM-5639). Those communities are 94.2 kilometers apart, whereas a distance of 130 kilometers is required between first adjacent Class C2 allotments. Although the *Notice* stated that the Tuscaloosa modification proposal also conflicted with the modification proposal to substitute Channel 226C1 for Channel 280A at Marion, Alabama, and to modify Station WJAM-FM accordingly (RM-5695), that conflict has been removed. *See* paragraph 2(c), *infra*. As for the required substitutions, the Cordova substitution (Channel 223A), does not conflict with any other proposal. However, the requested substitution at Trinity (Channel 291A for Channel 223A) would require a site restriction 10.4 kilometers southeast[11] of Trinity to avoid short spacing to Station WLAC-FM, Channel 290C, Nash-

ville, Tennessee.[12] Moreover, the Trinity proposal conflicts with the proposal to allot Channel 291A to Hartselle, Alabama, as that community's first local FM service (RM-5631). The distance between the two communities is 13.2 kilometers whereas 105 kilometers is required between Class A co-channels.

(b) *Linden (Channel 226C2) (RM-5639):* The proposal to substitute Channel 226C2 for Channel 296A at Linden and to modify the license for Station WDAL(FM), requires a site restriction 7.8 kilometers east[13] of the community to avoid short-spacing to Station WBLX(FM), Channel 225, Mobile, Alabama,[14] as well as Station WQGL(FM), Channel 228A, Butler, Alabama.[15] As indicated, *supra*, this proposal is also in conflict with the Tuscaloosa proposal (Channel 225C2). Additionally, this proposal also conflicts with the modification proposal to substitute Channel 226C1 for Channel 280A at Marion. The Linden modification proposal also conflicts with the proposal to substitute Channel 227C2 for Channel 228A at Evergreen, Alabama. The distance between Linden and Evergreen is 122.4 kilometers whereas 130 kilometers is required between first adjacent Class C2 channels. The *Notice* also advised that the alternative of Channel 253C2 at Linden could be accommodated with a site restriction 32.0 kilometers (19.8 miles) southeast of the community.

(c) *Marion (Channel 226C1) (RM-5695):* This proposal, as originally filed, conflicted with those for Tuscaloosa (Channel 225C2), and Linden (Channel 226C2), as noted *supra*, and well as that for Evergreen (Channel 227C2). The distance between Marion and Evergreen is 122.8 kilometers whereas 158 kilometers is required between first adjacent Class C1-C2 channels. Moreover, it required a site restriction 14.0 kilometers (8.7 miles) south of the community to avoid short spacing to Station WBLX(FM), Channel 225C, Mobile, Ababama, as well as Channel 226A, Ft. Rucker, Alabama (applications pending), and Station WDJC(FM), Channel 229C, Birmingham, Alabama. Although the Marion site would be short spaced to the application site specifed by Station WCPC-FM, Channel 227C, Houston, Mississippi, we indicated in the *Notice* that the latter is not protected. However, during the comment stage of this proceeding, we received notification that MRI's construction permit for Station WJAM-FM had expired. It was subsequently reinstated by the Commission, and MRI was given until December 30, 1988 to construct its Class A facilities on Channel 280A. Thereafter, MRI amended its proposal to request the substitution of another Class A channel for its present one (Channel 280A), to resolve a siting problem. The amended proposal has been accepted and another Class A channel will be considered herein in order to remove a conflict with the proposals at Tuscaloosa (RM-5647), Linden (RM-5639), and Evergreen (RM-5763) (as discussed, *infra*), as well as an impediment to the site specified by Station WCPC-FM, Channel 227C1, Houston, Mississippi,[16] in its application to relocate its transmitter and modify its facilities to maintain Class C status, at coordinates 33-45-06 and 88-52-40.

(d) *Evergreen, (Channel 227C2) (RM-5763):* As indicated, *supra*, the proposal to substitute 227C2 for Channel 228A and to modify the facilities of Station WIJK-FM is mutually exclusive with the modification proposal to substitute Channel 226C2 for Channel 296A at Linden. *See* paragraph 2(b), *supra*.

(e) *Hartselle (Channel 291A) (RM-5631):* As indicated above, the proposal to allot Channel 291A to Hartselle is mutually exclusive with the proposed substitution of Channel 291A for Channel 223A at Trinity to accommodate RSI's modification proposal at Tuscaloosa. *See* paragraph 2(a), *supra*.

(f) *Demopolis (Channel 293C2) (RM-5655):* Although SCI requested the substitution of Channel 253A for Channel 296A at Linden to accommodate the proposed substitution of Channel 293C2 for Channel 292A at Demopolis and the modification of its facilities for Station WZNJ(FM), the conflict would be removed if either Channel 226C2 or alternate Channel 253C2 is substituted at Linden, as proposed. *See* paragraph 2(b) above.

3. In response to the *Notice*, three parties submitted counterproposals. MRI proposed the use of Channel 228C2 in lieu of Channel 227C2 at Evergreen, the substitution of Channel 250C2 for Channel 228A at Butler, Alabama,[17] the substitution of Channel 280C2 for Channel 280A at Columbus, Mississippi, and modification of the license of Station WACR(FM), Channel 280A, accordingly. Moreover, MRI favored the substitution of alternate Channel 253C2 for Channel 226C2 at Linden. No modification at Tuscaloosa is contemplated by this proposal, thus obviating the need to change Channel 223A at Trinity. However, since this proposal was based on MRI's initial expression of interest in Channel 226C2 at Marion, which has been withdrawn, the only aspect of its counterproposal we will consider is the substitution of Channel 280C2 for Channel 280A at Columbus, Mississippi. The distance between the Columbus proposal for Channel 280C2 and existing Channel 280A at Marion is 133.1 kilometers, whereas 163 kilometers is required between Class A and C2 co-channels.[18]

4. RSI counterproposed the substitution of Channel 237A instead of Channel 223A, for Channel 225A at Cordova, thereby obviating the need for any change in the allotment of Channel 223A at Trinity. This, it claims, would remove a confict between proposed Channel 291A at Hartselle and RSI's proposed substitution at Tuscaloosa, which would otherwise require use of Channel 291A at Trinity. Additionally, RSI favored the substitution of Channel 253C2 for Channel 296A at Linden, Channel 248A for Channel 280A at Marion, Alabama, and the substitution of Channel 280C2 for Channel 280A at Columbus.[19]

5. Slatton counterproposed the substitution of Channel 292C2 for Channel 292A at Sheffield, Alabama,[20] and modification of its license for Station WBTG-FM, accordingly. This proposal is mutually exclusive with the proposed use of Channel 291A at Trinity and Hartselle, Alabama. The distance between the licensed site of Station WBTG-FM and Trinity is 64.1 kilometers, and between WBTG-FM and Hartselle 76.1 kilometers, whereas 105 kilometers is required between first adjacent Class A and C2 channels. Thereafter, Slatton and RH filed supplemental comments suggesting that an additional site restriction

on the respective proposals at Sheffield and Hartselle could remove a conflict between the two communities.[21] Moreover, Slatton and RH urge that present Channel 223A at Trinity remain unchanged.

6. In a joint request for expedited action, RSI notes that at the inception of this proceeding, the Commission was presented with six proposals, one of which seeks a new primary service at Hartselle and five proposals seeking modification of existing facilities to expand service at Tuscaloosa, Linden, Marion, Evergreen and Demopolis. Although we indicated that we must determine the preference to be accorded the mutually exclusive proposals, RSI observes that the withdrawal of interest by MRI in Channel 226C1 at Marion, Alabama, has removed its mutual exclusivity with the proposals at Tuscaloosa, Linden, Evergreen, and the pending application of Station WCPC-FM, Houston, Mississippi, to modify its facilities to maintain Class C status (BPH-870227OJ). Thus, RSI asserts that since it has submitted a plan endorsed by all proponents under consideration herein except RH and Slatton (since the Sheffield and Hartselle proposals were not in conflict with RSI's counterproposal), there is no need to perform a comparative analysis among the remaining communities. We agree. Although RSI has requested that the Sheffield and Hartselle proposals be severed from this proceeding, we believe their inclusion in our determination herein is in the public interest.

7. Based on the above, we will allot Channel 291A to Hartselle, Alabama, as that community's first local FM service. Channel 291A can be allotted to Hartselle with a site restriction 2.8 kilometers southeast of the community.[22] Moreover, we believe there are public interest benefits to be gained by upgrading the FM facilities of Station WTUG(FM), Tuscaloosa, Alabama, Station WDAL(FM), Linden, Alabama, Station WJAM-FM, Marion, Alabama, Station WEGN-FM, Evergreen, Alabama, Station WBTG-FM, Sheffield, Alabama, and Station WACR, Columbus, Mississippi. Therefore, we are substituting Channel 225C2 for Channel 224A at Tuscaloosa, Alabama, and modifying the license for Station WTUG(FM), accordingly. Channel 225C2 can be allotted to Tuscaloosa at the petitioner's specified site 24.3 kilometers east.[23] In order to accommodate the Tuscaloosa modification, we will substitute Channel 237A for Channel 225A at Cordova, Alabama, and modify the license of Station WFFN(FM), as requested. Channel 237A can be allotted to Cordova with a site restriction 9.4 kilometers north.[24] Use of the latter two site restrictions is required to prevent a 1 mv/m contour overlap between Station WTUG(FM) and co-owned Station WFFN(FM). As a result of our determination regarding Cordova, it is not necessary to disturb the current allotment of Channel 223A at Trinity, Alabama. Channel 253C2 will be substituted for Channel 296A at Linden, Alabama, and the license for Station WDAL(FM) modified in accordance with the provisions of Section 1.420(g) of the Commission's Rules. Channel 253C2 can be allotted to Linden with a site restriction 13.6 kilometers (8.5 miles) east[25] to avoid short spacing to Station WYKK(FM), Channel 252A, Quitman, Mississippi.[26] Channel 248A will be substituted for Channel 280A at Marion, and the permit for Station WJAM-FM modified, as requested. Channel 248A can be allotted to Marion with a site restriction 1.7 kilometers (1.0 mile) north[27] of the community to avoid short-spacing to Station WABB-FM, Channel 248C, Mobile, Alabama.[28] Channel 227C2 will be substituted for Channel 228A at Evergreen, Alabama, and the license for Station WIJK-FM modified accordingly. Channel 227C2 can be allotted to Evergreen at the current site of Station WIJK-FM.[29] Channel 293C2 will be substituted for Channel 292A at Demopolis and the license for Station WZNJ(FM) modified accordingly. Channel 293C2 can be allotted to Demopolis with a site restriction 26 kilometers southeast[30] of the community to avoid short-spacing to Channel 293A at Bay Minet and Vernon, Alabama, both of which were allotted in MM Docket No. 84-231. This site also clears an application at each of those communities (*i.e.*, 880805MW and 880712MK, respectively). Channel 292C2 will be substituted for Channel 292A at Sheffield, Alabama, and the license for Station WBTG-FM modified accordingly. Channel 292C2 can be allotted to Sheffield with a site restriction 26.3 kilometers (16.3 miles) northwest[31] of the community. Channel 280C2 will be substituted for Channel 280A at Columbus, Mississippi, and the license for Station WACR-FM modified, as requested. Channel 280C2 can be allotted to Columbus with a site restriction 23.2 kilometers northeast[32] to avoid short-spacing to Station WHER(FM), Channel 279C, Hattiesburg, Mississippi.[33]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to read as follows:

City	Channel No.
Cordova, Alabama	237A
Demopolis, Alabama	293C2
Evergreen, Alabama	227C2
Hartselle, Alabama	291A
Linden, Alabama	253C2, 275A[34]
Marion, Alabama	248A
Sheffield, Alabama	292C2
Tuscaloosa, Alabama	225C2, 239C1, 288A
Columbus, Mississippi	235C2, 276C2, 280C2

9. The window period for filing applications on Channel 291A at Hartselle, Alabama, will open on **January 17, 1989,** and close on **February 17, 1989.**

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Radio South, Inc. for Station WTUG-FM, Tuscaloosa, Alabama, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 225C2 in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Radio South, Inc. for Station WFFN(FM), Cordova, Alabama, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 237A in lieu of Channel 225A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Marengo County Broadcasting, Inc. for Station WDAL(FM), Linden, Alabama, IS MODIFIED, effective **January 13, 1989** to specify operation on Channel 253C2 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Marion Radio, Inc. for Station WJAM-FM, Marion, Alabama, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 248A in lieu of Channel 280A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in [Construction Permit BPH-850403IC] except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with [Construction Permit BPH-850403IC] except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wolf Broadcasting Corp. for Station WIJK-FM, Evergreen, Alabama, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 227C2 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Southstar Communications, Inc. for Station WZNJ(FM), Demopolis, Alabama, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 293C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Slatton and Associates Broadcasters, Inc. for Station WBTG-FM, Sheffield, Alabama, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 292C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of T & W Communications Corporation for Station WACR-FM, Columbus, Mississippi, IS MODIFIED, effective **January 13, 1989,** to specify operation on Channel 280C2 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date, of this *Order* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Sheffield, Alabama and Columbus, Mississippi, have been added to the caption.

[2] Applications on file for Channel 223A at Trinity, Alabama include: Moulton Broadcasting Co., Inc. (BPH-861215ML); Trinity FM Associates (BPH-861215MG); Victoria Newman (BPH-861215MA); Beatrice M. Covington (BPH-861215MF); Morgan Broadcastaing, Inc. (BPH-861215MH); R&B Communications, Inc. (BPH-861212MB); and John Timms (BPH-861215MK). The applicants were served a copy of the *Notice* to elicit their comments.

[3] The Linden proposal was originally submitted by L. Lynn Henley. Marengo County Broadcasting, Inc. is the successor-in-interest to Mr. Henley, having purchased the WDAL(FM) construction permit from him (BAPH-861103GZ).

[4] Formerly Station WEGN-FM.

[5] SBC requested that its petition for rule making in MM Docket No. 87-375 for Freeport, Florida be considered in the context of this proceeding in the event of a conflict with Evergreen, Alabama. However, since the Freeport proceeding has been dismissed, SBC's comments are moot.

[6] Public Notice of these counterproposals was given on January 27, 1988, Report No. 1709.

[7] RSI's response was filed one-day late. Although the comments were not accompanied by a motion to accept, they were served on all parties. Therefore, no party will be prejudiced by their acceptance.

[8] The latter two comments of White and Johnson, applicants for Channel 250A at Wiggins, Mississippi, are related to one aspect of the counterproposal advanced by MRI regarding Butler, Alabama. Since they were not accompanied by a motion to accept, and have no bearing on the outcome of this proceeding, they will not be considered.

[9] Those comments were not filed in accordance with the requirements of Section 1.420(c) and (e) of the Commission's Rules. Moreover, they were filed subsequent to the cut-off date, and were not served on the parties to this proceeding. Thus, they constitute *ex parte* presentations and will not be considered in this proceeding. *See* Sections 1.1202(b)(1) and 1.1208 of the Rules.

[10] Although the *Notice* stated that Channel 225C2 could be used at the present site of Station WTUG-FM (33-09-01 and 87-29-58), we indicated that since RSI is also the licensee of Station WFFN(FM), Channel 225A at Cordova, it would be required to submit a showing to determine whether there would be any 60 dBu contour overlap with its proposed modification at Tuscaloosa. In response, RSI amended its proposal to specify a site 24.3 kilometers east of the communityat coordinates 33-09-08 and 87-18-48 to demonstrate that no overlap would occur.

[11] Coordinates used for Channel 291A at Trinity are 34-31-14 and 87-02-32.

[12] Coordinates at the licensed site of Station WLAC-FM are 36-02-08 and 86-50-56.

[13] Reference coordinates for Channel 226C2 at Linden are 32-19-15 and 87-43-03.

[14] Reference coordinates at the licensed site of Station WBLX(FM) are 30-37-35 and 87-38-50.

[15] Reference coordinates at the licensed site of Station WQGL(FM) are 32-06-02 and 88-14-07.

[16] Reference coordinates at the application site of Station WCPC-FM are 33-45-06 and 88-52-40.

[17] As noted by RSI, this proposal is technically defective in that it failed to acknowledge a 5.0 kilometer short spacing to Station WYKK(FM), Channel 252A, Quitman, Mississippi, at reference coordinates 32-03-51 and 88-43-29. Although Station WYKK(FM) has been directed to move to Channel 255A in MM Docket No. 87-432, to accommodate the use of Channel 252C2 by Station WDLT(FM), Chickasaw, Alabama, it may continue to operate on its present channel until Station WDLT(FM) has been granted a permit on Channel 252C2. Since the Butler counterproposal was filed after the cut-off date in MM Docket 87-432, it is unacceptable as a counterproposal and will not be considered further in this proceeding. If Butler wishes to pursue an upgrade of its present Class A channel, it may initiate a new rule making proceeding in accordance with Section 1.401 of the Commission's Rules.

[18] This determination is based on reference coordinates of 33-37-45 and 88-13-19 for Channel 280C2 at Columbus, Mississippi, and 32-40-25 and 87-21-34 for Channel 280A at Marion, Alabama.

[19] Although RSI initially suggested the substitution of Channel 255A for Channel 280A at Columbus, that proposal was based on an effort to accommodate MRI on Channel 280C2 in lieu of Channel 226C1. However, since MRI withdrew its interest in a higher class channel, we will only consider the proposed substitution of Channel 248A for Channel 280A at Marion.

[20] This proposal is contingent upon Station WTMX-FM, New Albany, Mississippi, relocating from Channel 292A to Channel 294C2, as directed in MM Docket No. 87-58, 3 FCC Rcd 615 (1988), *aff'd. on recon.* (MO&O adopted October 24, 1988).

[21] Although a site restriction 9.6 kilometers (5.9 miles) northeast has been suggested for Channel 291A at Hartselle, at 34-30-00 and 86-51-30, we have determined that 291A can be sited closer to the community, 2.8 kilometers (1.6 miles) southeast at reference coordinates 34-25-52 and 86-54-26.

[22] Reference coordinates used for Channel 291A at Hartselle are 34-25-52 and 86-54-26.

[23] Reference coordinates used for Channel 225C2 at Tuscaloosa are 33-09-08 and 87-18-48.

[24] Reference coordinates for Channel 237A at Cordova, Alabama are 33-50-33 and 87-11-40.

[25] Reference coordinates for Channel 253C2 at Linden are 32-20-50 and 87-39-43.

[26] The Notice indicated that consideration of Channel 253C2 at Linden would require a site restriction 32.0 kilometers (19.8 miles) southeast. Although not clarified therein, the restriction was required to clear the protected buffer zone previously afforded Station WZLQ(FM), Channel 253, Tupelo, Mississippi, at 34-18-09 and 88-42-21. That restriction is no longer necessary since the buffer protection has been removed and Station WZLQ(FM) has been issued a construction permit at a new site (34-23-52 and 88-53-03), which is consistent with the Linden proposal. However, the distance between Linden and the transmitter site of Station WYKK(FM), Quitman, Mississippi, at reference coordinates 32-03-51 and 88-43-29, is 91.4 kilometers whereas 105 kilometers is required. As noted, *supra*, Station WYKK(FM) has been directed to modify its facilities to specify operation on Channel 255A at Quitman, which will remove the short-spacing to Channel 253C2 at Linden. However, rather than require Station WDAL(FM) to await the issuance of a license to Station WYKK(FM) on Channel 255A, before it may be licensed on Channel 253C2, use of the site restriction employed thereon removes that impediment.

[27] Reference coordinates used for Channel 248A at Marion, Alabama, are 32-38-38 and 87-19-29.

[28] Reference coordinates at the licensed site of Station WABB-FM are 30-41-20 and 87-49-49.

[29] Reference coordinates at the licensed site of Station WIJK-FM are 31-26-29 and 86-56-08.

[30] Reference coordinates at the restricted site for Channel 293C2 are 32-20-25 and 87-38-55.

[31] Reference coordinates used for Channel 292C2 at Sheffield, Alabama, are 34-55-12 and 87-53-18. As indicated, *supra*, this allotment is contingent upon Station WTMX-FM, New Albany, MS, relocating from Channel 292A to Channel 294C2, as directed in MM Docket No. 87-58.

[32] Reference coordinates used for Channel 280C2 at Columbus, Mississippi, are 33-37-45 and 88-13-19. Although this site meets the minimum spacing requirements to the reference coordinates for Channel 282A at State College, Mississippi, allotted in MM Docket No. 84-231, at 33-27-06 and 88-47-18, it is short-spaced to one of two applications filed therefor (880315MA) However, that application was filed after the window filing period had closed on February 17, 1988. Thus, that applicant is not protected from the allotment of Channel 280C2 at Columbus.

[33] Reference coordinates at the licensed site of Station WHER(FM) are 31-31-37 and 89-08-07.

[34] A proposal is pending in a separate proceeding to substitute Channel 275C2 for Channel 275A at Linden, Alabama (RM-6523).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-533

In the Matter of

Amendment of Section 73.202(b),	RM-6398
Table of Allotments,	RM-6470
FM Broadcast Stations.	
(Clarksville and Lanesville,	
Indiana)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 1, 1988; Released: November 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers two separately-filed petitions for rule making seeking the allotment of FM Channel 226A. The first, filed by Janet Miller (Miller) seeks the allotment to Lanesville, Indiana, as that community's first local broadcast service (RM-6398). The second proposal, filed on behalf of Owen-Jackson (OJ), seeks the allotment to Clarksville, Indiana, as that community's first local broadcast service (RM-6470). Each petitioner expressed an intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 226A can be allotted to Lanesville (population 586),[1] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2] Channel 226A can be allotted to Clarksville (population 15,164), with a site restriction 7.3 kilometers (4.6 miles) west [3] to avoid short-spacing to Station WVLK-FM, Channel 225C1, Lexington, Kentucky,[4] as well as to Station WXLN(FM), Channel 280A, Louisville, Kentucky.[5] Channel 226A cannot be allotted to both communities since the proposals are separated by a distance of 13.6 kilometers (8.4 miles), whereas a minimum distance of 105 kilometers (65 miles) is required between co-channel Class A allotments. Therefore, the proposals must be comparatively considered. Accordingly, we shall provide each proponent an opportunity to demonstrate in comments why its community should be preferred. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Petitioners should note that due to the close proximity of the communities, if the comparative factors should prove equal, the larger community would be preferred. Therefore, the proponents may wish to determine if other channels may be available to resolve the existing conflict.

3. In consideration of the above, the Commission seeks comments on the optional proposals to allot Channel 226A to Lanesville or Clarksville, Indiana, as a first local broadcast service to either community. Accordingly, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Clarksville, Indiana	--	226A
	or	
Lanesville, Indiana	--	226A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 20, 1989,** and reply comments on or before **February 6, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or their counsel, as follows:

Janet Miller
1680 Hwy. 62E
Corydon, IN 47112
(*Pro se*)

John Wells King, Esq.
Haley, Bader & Potts
2000 M St., NW, Suite 600
Washington, DC 20036-4574
(Counsel for Owen-Jackson)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures reported are taken from the 1980 U.S. Census.

[2] Coordinates utilized for this determination are those of the city reference point at 38-14-13 and 85-59-09.

[3] Reference coordinates at the restricted site are 38-17-01 and 85-50-32.

[4] Reference coordinates at the licensed site of Station WVLK-FM are 38-02-22 and 84-24-11.

[5] Reference coordinates at the licensed site of Station WXLN(FM) are 38-15-20 and 85-45-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-234

In the Matter of

Amendment of Section 73.202(b), RM-6197
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1988; Released: November 29, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 3119 (1988), proposing the substitution of FM Channel 287A for Channel 288A at Aberdeen, Missisippi. The *Notice* was issued in response to a petition filed by Tenn-Tom Broadcasting Corporation (petitioner). Petitioner also requested modification of its license for Station WWZQ-FM to specify operation on Channel 287A in lieu of Channel 288A. Petitioner filed supporting comments. No other comments were received.

2. As stated in the *Notice*, petitioner requested the substitution of channels because Station WWZQ-FM is operating with facility coverage that has a severe site restriction placed upon it by a new Class C2 station in Starkville, Mississippi, which could be removed by the substitution of Channel 287A for Channel 288A at Aberdeen. According to petitioner, permitting Station WWZQ-FM to change channels will enable the station to provide greater coverage to the Aberdeen area. We believe the public interest would be served by the substitution of channels in order to alleviate the site problems for Tenn-Tom Broadcasting Corporation. Channel 287A can be allotted to Aberdeen at the petitioner's specified coordinates.[1] We shall modify the license of Station WWZQ-FM, Aberdeen, to specify Channel 287A in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Aberdeen, Mississippi	287A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WWZQ-FM, Aberdeen, Mississippi, IS MODIFIED to specify operation on Channel 287A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH6721 except the channel as specified above. Any other changes except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH6721, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 287A at Aberdeen are 33-48-32 and 88-32-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

UNITED STATES SATELLITE BROADCASTING COMPANY, INC. and — File No. DBS-81-07/84-07/Ext.

DOMINION VIDEO SATELLITE, INC. — File No. DBS-81-08/84-05/Ext.

For Extensions of Time to Construct
Direct Broadcast Satellite Systems

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1988; Released: November 29, 1988

By the Commission:

1. The Commission has for consideration the above-captioned applications for extension of time filed by United States Satellite Broadcasting Company, Inc. (USSB) and Dominion Video Satellite, Inc. (Dominion, formerly Video Satellite Systems, Inc.). USSB and Dominion seek additional time, until December 4, 1992, in which to complete construction and begin operations on the Direct Broadcast Satellite (DBS) systems for which they hold conditional construction permits.[1]

2. USSB and Dominion were granted their original conditional construction permits for DBS systems on December 3, 1982.[2] *CBS, Inc.*, 92 FCC2d 64.[3] One of the conditions of those authorizations was that each permittee "proceed with the construction of its system with due diligence." *Id.* at 110. The "due diligence" requirement provides, in pertinent part, that a DBS permittee's "satellite station shall . . . be required to be in operation within six years of the construction permit grant, unless otherwise determined by the Commission upon proper showing in any particular case." 47 C.F.R. §100.19(b).[4] This provision thus requires that USSB's and Dominion's satellites be in operation by December 3, 1988.

3. Neither USSB nor Dominion expects to be able to meet this deadline, and each has submitted a request for extension of time. USSB's extension request is supported by Hughes Communications Galaxy, Inc. (Hughes), opposed by TEMPO Satellite, Inc. (Tempo), and partially opposed by Advanced Communications Corporation (Advanced), all of which are DBS permittees or applicants. No comments have been submitted with respect to Dominion's request.

4. Tempo has also filed a request for clarification and modification of the Commission's DBS processing procedures as they govern the monitoring of the satellite construction progress of DBS permittees. That request and related pleadings are also considered here.

Extension Requests

USSB

5. USSB's argument, briefly stated, is that it has worked diligently in pursuing its construction, and that its inability to meet the deadline is a function of the considerable obstacles to be surmounted, which were due to factors beyond its control. It insists that the delay has not been due to any failure to make every effort to construct a DBS satellite system promptly. It provides a number of reasons, primarily revolving around changed external circumstances, why it will now be able to proceed promptly with construction, despite its inability to do so up to this time. The reasons cited by USSB for the delay in completion of its system begin with the need for entirely new transmission and reception equipment and the related need for an entire industry infrastructure to be established. It also claims that a number of events have led to a business climate which has failed to attract investors.[5] It claims that it is now able to proceed further with spacecraft construction due to several changes in circumstances: DBS service has been initiated in Japan and is imminent in Europe, which has made equipment available and improved its quality and lowered its price; foreign DBS service has also increased public and investor awareness of the technological and commercial potentials of DBS; recent widespread interest in Advanced Television Systems (ATV) has focused attention on DBS, which is alleged to be an ideal transmission medium for ATV; and domestic broadcasters' awareness of DBS has finally grown into an interest in participation.

6. Hughes adds that the Commission's requirement for operation within six years of the grant of the conditional construction permit was established at a time when the Commission did not have full cognizance of the difficulties confronting a DBS permittee and, in retrospect, was too short a period. It stresses the virtual impossibility of launching a DBS system in the time permitted by the rule. Both parties contend that the Commission's contemplation of extensions of time is evident in the text of the rule. Hughes urges that the Commission's primary consideration in determining a course of action should be to promote the earliest delivery of DBS service to the public. On this point it contends that a "serious" permittee which has been slowed by the need to adapt to state-of-the-art technology is more reliable than new applicants which are starting from scratch and have not even met the first due diligence requirement of securing a construction contract. It argues further that the availability or unavailability of spectrum/orbit assignments for other potential DBS operators should not weigh in the Commission's decision because the adequacy of the remaining DBS allocation will not even be determined until the first due diligence period closes for the currently pending applicants and the number of parties remaining and requiring assignments is established.[6]

7. Tempo counters that an uncertain business climate is not satisfactory excuse for an extension of time to build a satellite system, citing previous cases for the Fixed Satellite Service (FSS), which state the Commission's concern that satellite permittees not be allowed to hold satellite assignments for unnecessarily long periods while preventing other parties from using them to provide service.[7] It also cites a Commission determination that the failure of an FSS permittee to obtain financing is not considered a factor beyond its control.[8] It also contends that several

other former DBS permittees, facing the same uncertainties and difficulties now cited by USSB, honored the rule's construction deadline and surrendered their conditional construction permits at the end of their first due diligence (construction contract) period, rather than undertake to maintain a permit with an anticipation of later extensions of time. Finally, it insists that the satellite construction contract which USSB signed to satisfy its first due diligence requirement (to begin construction within one year), and upon which basis USSB retained its permit and was allotted its orbital location and channels, presumably had no unresolved contingencies which would preclude construction. It continues that had the Commission realized there was a contingency (stated or implied) which would permit such lengthy construction delay in the face of an unfavorable business climate, the Commission would not have found the contract acceptable in the first place.

8. Advanced partially opposes USSB's extension request, arguing that USSB could be allowed to keep its permit, but its specific orbit/channel assignment should be rescinded by the Commission. Advanced contends that permitting USSB to continue to hold a desirable DBS assignment prejudices other DBS parties, and disserves the public by delaying the introduction of DBS service. It contends that each of the specific excuses offered by USSB has been rejected in the past in other DBS due diligence cases, and that the only exceptions to strict application of the rule have been in two cases which involved parties' misunderstanding of arguably ambiguous aspects of the requirements, in addition to the parties' diligent efforts.[9]

Dominion

9. While Dominion does not lay claim to the same high public profile as does USSB in the advancement of DBS generally, it does make a similar claim of expenditure of effort and money in its continued pursuit of a DBS system. In addition, Dominion expects to begin operations on a reduced scale in the relatively near future. It has signed an agreement to purchase one three-channel DBS satellite from GE Astro Space Division, with an option to purchase another three-channel DBS satellite. These DBS satellites are substantially complete and nearly ready for launch.[10] Dominion has also signed a "launch reservation agreement" providing for launch services within twelve months of signing a launch contract, with launch currently projected for "third quarter, 1989."

Resolution

10. The text of the due diligence rule adopted reflects the Commission's awareness that the propriety of the long-term timetable it was establishing for actual construction was difficult to predict at that stage of DBS's nascent development:

> Permittees of interim direct broadcast satellite systems shall be required to begin construction or complete contracting for construction of the satellite station within one year of the grant of the construction permit. The satellite station shall also be required to be in operation within six years of the construction permit grant, unless otherwise determined by the Commission upon proper showing in any particular case.

47 C.F.R. §100.19(b). The first due diligence requirement is clear and unequivocal. It is intended to eliminate as quickly as reasonably possible those parties not willing or able to take immediate steps to begin implementation of their DBS plans, and this first provision accordingly has been strictly interpreted in previous cases, as cited by the parties.[11] The second requirement, at issue here, stands in stark contrast in specifically contemplating the need for possible additional judgments by the Commission at the much later dates at which performance completion would be due. Consequently, those cases in which the Commission considered extensions of the first due diligence deadline for DBS conditional permittees, while instructive, are not controlling here. The totality of circumstances -- those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public -- must be considered in making the determination in these cases.

11. A failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure meet a construction timetable in other satellite services. (*See* notes 7, 8, above.) If considered in a vacuum, they are little more compelling as excuses for failure to meet a construction timetable for building a DBS system. DBS conditional construction permits are granted on the applicant's representation and the Commission's reliance that the applicant has a sound financial capability and, to the extent it is necessary, a firm and reasonable financing plan. To whatever extent a permittee's ability or willingness to maintain the construction of its DBS facilities is dependent on uncertain future fundraising or tentative business projections, the risk of success or failure in that endeavor falls squarely on that party's shoulders. Neither other existing or potential DBS participants nor the Commission can, or should be expected to, accommodate their mistaken projections or modified expectations.

12. In the current DBS field, however, there are other factors which render USSB's and Dominion's situations more compelling. DBS is unproven as a technology and as a commercial enterprise. Moreover, DBS technology has advanced explosively in these first several years. For example, it has evolved from four-satellite systems to one- and two-satellite systems, from three-channel satellites to sixteen-channel satellites, from "three foot or smaller" parabolic (dish-type) receive antennas to 12- to 16-inch square flat-plate receive antennas, and from 960 total watts of output power required per channel of service over the country to 200 watts total required per channel.[12] Many of these improvements are the result of independently driven improvements in the basic satellite structures (buses) and satellite equipment made by the various satellite manufacturers; other improvements are specific to DBS transmission and reception equipment. In either case, as the potential for these dramatic improvements in efficiency and cost emerged, it would not have been prudent, even if feasible, to proceed with nearly obsolete, less cost effective technology. DBS reception equipment is only now being commercially produced in markets overseas. Additionally, the negative nature of much of the publicity surrounding earlier attempts at direct-to-home satellite services at lower power in other frequency bands and the withdrawal of a prominent participant (Comsat) from DBS, may have cooled the ardor of potential investors in not only these two DBS satellite systems but also in

production of ancillary DBS equipment. While these potential difficulties may have been perceived, they were obviously not fully accounted for when the due diligence rule was set for DBS.[13]

13. Despite these obstacles and difficulties, USSB and Dominion have certainly pursued their DBS systems with due diligence in the ordinary sense of the term. Each claims to have spent several million dollars, not only designing satellites on now-obsolete buses, and redesigning them for construction based on the newer buses available, but also on promoting their systems and DBS generally. USSB initiated the formation of the DBS technical standards Advisory Committee and actively participated in the establishment and ongoing activities of the Direct Broadcast Satellite Association. It also carried the burden of securing a clarification of the permissible uses of DBS service, petitioning the Commission for a declaratory ruling.[14] USSB personnel have actively participated, on USSB time and expense, at dozens of international and domestic DBS conferences, symposia, and seminars, and it has hosted numerous events for international and domestic delegations of public and private individuals and organizations involved in DBS. Dominion has already started marketing to, and signing up, advance subscribers. Each of them appears to have made every reasonable effort to complete a DBS system in the period of time which has elapsed since their permits were granted. It is clear that none of the numerous other parties which initiated DBS plans successfully persevered, and it is dubitable that any other party, including Tempo or Advanced, could have made a more productive effort during this same period.[15] Consequently, it appears that the most obvious conclusion to draw from these parties' inability to meet the construction timetable despite their considerable efforts is that the timetable itself has proved to be inappropriate during this initial period of DBS development.[16]

14. The requested extensions of time can thus be justified on the basis of interpretation of the rule, prevailing circumstances, and USSB's and Dominion's considerable efforts to comply. There remains the additional critical consideration of promoting the earliest viable DBS service to the public. USSB's and Dominion's demonstrated inability to proceed swiftly in building DBS systems are argued to disserve the public by slowing the initiation of DBS service. To the contrary, however, the above discussion of the justification for USSB's and Dominion's failure to comply with the due diligence rule reveals no lack of capability or commitment. It would be short-sighted to eliminate the very parties whose efforts to date, even if not in accord with a pre-established timetable set without the benefit of experience, now would appear to have brought them much closer to the threshold of providing service than any non-permittee. Thus, this compelling interest of service to the public argues for granting the requested extensions of time.

15. Finally, consideration of the rights and positions of the competing parties whose interests are at odds here also weighs in favor of granting the extensions of time. On the one hand, newer DBS entities can argue with some merit that USSB and Dominion have had their chance and others should now be given the same opportunity to succeed or fail. If they are not more able than USSB and Dominion to build and launch a system promptly and within the prescribed period of time, then they in turn would lose their own position and the opportunity would pass to others including, possibly, USSB and Dominion. However, any opportunity for the more recent DBS participants to succeed, either at all or more promptly than USSB or Dominion, would likely be built on the foundation painstakingly laid by these parties, among others. USSB and Dominion cannot be fairly deprived of a reasonable opportunity to also reap the rewards of their efforts, while extending that opportunity to others. Particularly now, when it appears that circumstances may finally be conducive to the initiation of DBS service, USSB and Dominion must be given some chance in this improved environment to continue their efforts to bring DBS service to the public.

16. Tempo's argument that other former permittees could have maintained their permits had they anticipated extensions of the deadline imposed by the due diligence rule is unavailing. While other entities made tentative or preliminary forays into DBS, some repeatedly, they have not shown the consistent, sustained perseverence displayed by USSB and Dominion. It appears, in retrospect, that some applications may have anticipated a more certain or immediate DBS market, and were abandoned when a significant financial commitment was required in the form of a construction contract. We would contrast USSB particularly sharply, given its continuing efforts to promote DBS generally, as well as its own system. For its part, Dominion currently looks like it may well be successful in launching the first DBS satellites, albeit at a later date than originally prescribed; there is no indication or claim that any other former DBS party could have or would have done the same. As to Tempo's complaint about the adequacy of USSB's construction contract, no contract guarantees completion of construction. Some contingency provisions are necessary in any contract for construction of this magnitude and complexity, and are not necessarily inconsistent with the contracting standard of the due diligence requirement. There is no evidence or allegation that USSB's (or Dominion's) contract included any contingency which would relieve the parties of their obligations to proceed under the contract or incur substantial liabilities. Nor is there any evidence or allegation that USSB (or Dominion) has failed to honor the commitments in its contract or has escaped the liabilities it incurred in signing the contract and upon the basis of which commitments, still extant, its permit was maintained and an orbit/channel assignment made. In fact, even though no USSB satellite has yet advanced to construction, considerable expense and effort has been expended so far by the contracting parties in the preliminary stages of construction.

17. For these reasons, the extensions of time to build requested by USSB and Dominion will be granted, and each will have until December 4, 1992, for its satellite(s) to be in operation. Both permittees will continue to submit semi-annual construction progress reports, and will be required to update the construction contract information they have on file in conformance with the clarification provided below. Moreover, both are advised that the Commission may enforce the new construction deadline more strictly, depending on future circumstances, as also explained below.

Tempo's Clarification/Modification Request

18. In a pleading related to its opposition to USSB's request for an extension of time, Tempo asks the Commission to clarify and modify its procedures for monitoring DBS permittees' progress in construction of their satellites.

It contends that the progress of DBS permittees in building their satellites needs to be more closely monitored in order to avoid unwarranted delay in the utilization of DBS assignments which will hinder the earliest introduction of DBS services. Tempo cites the stricter financial requirements of the Radiodetermination satellite services,[17] points out that adherence to construction milestones has been strictly enforced for domestic fixed satellites,[18] and observes that domestic satellite permits conditioned on due diligence have been canceled when the permittee failed to meet its construction requirements.[19] Tempo maintains that the Commission's oversight of due diligence in DBS satellite construction needs to be enhanced whether or not USSB's individual permit is revoked at this time.

19. As circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource, there does now appear a need for stricter enforcement of the construction progress requirements of the DBS rules. It is imperative that inefficient use of DBS assignments, whether intentional or inadvertent, be prevented, particularly if it becomes evident that incumbent permittees are unjustifiably preventing additional promising parties from attempting to deliver DBS service. Accordingly, the various DBS reporting requirements will be clarified to ensure that information regarding system construction elicited from DBS permittees is more uniform and specific than that which has been submitted in the past. This will enable the Commission to maintain a more precise knowledge of the construction progress, individually and collectively, of DBS permittees. This, in turn, will enable the Commission to more promptly take whatever positive actions appear warranted under future circumstances if extended delays in DBS satellite construction continue or reoccur.

20. DBS permittees are already required to submit satellite construction contracts or descriptions of their contracts in order to establish their compliance with the due diligence one-year rule. Henceforth, such submissions will not be considered adequate unless they include regular specific construction progress milestones in the construction timetable.[20] Subsequent changes in this timetable must also be submitted as they occur. The explanation of satellite construction progress which all permittees currently submit on a semi-annual basis must henceforth specifically describe satellite construction progress in measurable terms, including individual milestones timely reached and scheduled payments made. This will provide greater accuracy in any early Commission assessment of whether a DBS permittee has encountered an incapacitating problem or whether a DBS permittee will be able to construct and operate within the period specified in its construction permit.

21. The Commission may consider granting future extensions of time that become necessary for any DBS permittees. In any such considerations, the public interest in the prompt initiation of DBS service will continue to be a primary concern. An inability to proceed in a timely manner with satellite construction may weigh more heavily against allowing any permittee to maintain its specific orbit/channel assignment or its permit if newer permittees can clearly and convincingly demonstrate that they have definitely and significantly passed the permittee that is not meeting its deadline in progress in building their own satellites.[21] Similar action could be compelled if a pending applicant or applicants are prevented from receiving assignments because of their scarcity while a permittee is missing its construction deadline. Any such action would require a clear and convincing demonstration that changed circumstances in the industry or the particular nature of the applicant(s), or any other factors, make it evident that the permittee missing its deadline no longer enjoys a meaningful lead over the pending applicant(s).[22]

22. In conjunction with this clarification of reporting requirements, the updating of USSB's and Dominion's current construction contract information will be required by March 4, 1989. Hughes and Advanced, also DBS permittees, will be required to do the same. All parties' semi-annual progress reports will continue on the dates currently used.

23. *Paperwork Reduction Act Analysis.* In our estimation, the DBS due diligence reporting requirements will affect nine or fewer persons annually. Therefore, this request for information is not subject to the requirements of Section 3502 of the Paperwork Reduction Act of 1980, Public Law 96-511 (44 U.S.C. 3502).

24. Accordingly, IT IS ORDERED, That the Motions for Extension of Time in which to construct, until December 4, 1992, filed by United States Satellite Broadcasting Company, Inc. and by Dominion Video Satellite, Inc. ARE GRANTED.[23]

25. IT IS FURTHER ORDERED, That the Request for Clarification and Modification filed by TEMPO Satellite, Inc. IS GRANTED and the procedures and policies for filing and reviewing DBS construction contracts and semi-annual construction progress reports for the Direct Broadcast Satellite Service are clarified to the extent indicated in paragraphs 19 through 22, above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Dominion expects to begin partial operation on a limited number of channels before that date *(see* paragraph 9, below), but requests the additional time to complete building and begin operations of its full system.

[2] Each party has subsequently been granted technical modifications to its original permit.

[3] Several other parties were also granted conditional construction permits at the same time. Each of those other permits has been surrendered or canceled.

[4] The other aspect of the due diligence provision requires that DBS permittees begin construction or contract for construction of their systems within one year of the grant of the conditional permit. These parties were found to have met that requirement and were assigned specific orbital locations and channels on that basis. *United States Satellite Broadcasting Company, Inc.*, (Mass Media Bureau) Mimeo No. 5359, July 12, 1984; *Dominion Video Satellite, Inc.*, (Mass Media Bureau) Mimeo No. 5502, July 19, 1984.

[5] USSB cites the 1985 collapse of United Satellite Communications, Inc., which began a quasi-DBS service in late 1983, providing five Ku-band channels to selected U.S. cities from a medium-power Canadian satellite; the fact that "Skyband" service

(five medium-power channels from a domestic common carrier Ku-band satellite) was not implemented after some widespread publicity in 1983-84; the fact that an expected merger between early DBS permittees Satellite Television Corporation ("STC," a Comsat subsidiary) and CBS, Inc. (the broadcast station owner and network operator) did not occur; Comsat's decision to discontinue its efforts in DBS; the Challenger, Delta, and Ariane launch failures; the lack of standards for equipment and uncertainty about its availability; and uncertainty, until recently, regarding the ancillary services that would be permitted on DBS satellites.

[6] There are currently five new DBS applications on file, which collectively would require 168 orbit/channel allocations to implement. If USSB and Dominion are permitted to retain their orbit/channel reservations, a total of 128 orbit/channel allocations would remain currently available.

[7] Tempo cites *AT & T*, 2 FCC Rcd 4431 (1987) and *MCI Communications Corp.*, 2 FCC Rcd 233 (1987).

[8] *Report and Order* in CC Docket No. 81-704, 54 RR2d 577, 597 (n. 62) (1983).

[9] Advanced cites *CBS, Inc.*, 99 FCC2d 565 (1984); *RCA American Communications, Inc.*, 62 RR2d 554 (1987); and *Tempo Enterprises, Inc.*, 1 FCC Rcd 20 (1986).

[10] These satellites were originally built for STC, which formally terminated its plans to provide DBS service and returned its permit on February 8, 1988.

[11] *See* note 9, *supra*.

[12] The original DBS systems generally proposed 240 watts per channel for a signal that would cover one quarter of the continental United States (quarter-CONUS), thus requiring four transponders at 240 watts each to cover the entire U.S. with one channel. Most current proposals call alternately for half-CONUS signals at 100 watts each or full-CONUS signals at 200 watts each.

[13] While certain of these difficulties have been encountered at various times in the development of the FSS services and markets, the same confluence of events and circumstances and deadlines did not confront entities in that service. Construction deadlines were not strictly enforced in the early years, and became strictly enforced only after the satellite communications industry and markets were established. Consequently, the FSS cases, like the earlier DBS due diligence cases, while instructive, are not controlling.

[14] *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977 (1986).

[15] We note that Tempo is now an applicant for its third DBS construction permit, having failed to commence construction under either of its first two permits. *Satellite Syndicated Systems, Inc.*, 99 FCC2d 1369 (1984); *TEMPO Enterprises, Inc.*, 1 FCC Rcd 20 (1986); Letter from Peter H. Feinberg, October 1, 1987.

[16] This is not to say that the due diligence deadlines present an unreasonable requirement for future circumstances. Satellite construction typically requires only 32 to 42 months -- much less than the time period allowed by the rule. Most of the circumstances and events upon which the instant extension grants are based are peculiar to the initial stage of DBS development, and are not expected to continue to prevail indefinitely.

[17] *Second Report and Order* in Gen Docket Nos. 84-689, 84-690, 104 FCC2d 650, 663 (1986).

[18] Tempo cites *MCI*, *supra*, and *AT & T*, *supra*.

[19] *National Exchange, Inc.*, 1 FCC Rcd 682 (1986).

[20] The Commission does not intend to establish an exact number of construction milestones to be submitted, as the appropriate number may vary with the nature of the contract and the varying degrees of importance the contracting parties assign to various stages of the construction process. Contract submissions must continue to include payment schedules with sufficient specificity for the Commission to determine that the permittee is making a financial commitment to the construction of the satellite and to indicate that the milestones listed for the early stages of construction constitute meaningful levels of advancement in the satellite construction process. Permittees may continue to submit percentage figures rather than dollar amounts for each payment or a series of payments.

[21] Securing and launching the GE Astro satellites will be Dominion's best demonstration of due diligence. Although Dominion's current agreement with GE Astro calls for definite events to occur during 1988 and early 1989, its progress will be reviewed at the same times as the other permittees to see whether utilization of the GE Astro satellites appears certain. If Dominion does not complete its purchase of the GE Astro satellites, actual concrete progress in constructing new satellites will weigh heavily in any future considerations regarding its permit, particularly in the absence of efforts as demonstrably extensive as USSB's here.

[22] USSB or Dominion (or any other DBS permittee) may, of course, apply to sell its permit to (or merge with) another party which believes it is more willing and able to establish a DBS system.

[23] It should be noted that extending time to contruct DBS facilities does not preclude the Commission from also modifying those of the permittees' technical parameters that deviate from the Region 2 Plan if it becomes evident that serious inefficiencies in utilization of the orbit/spectrum resource are restricting the level of service that can be offered to the public or the number of parties that can participate in providing DBS service. This issue will be more completely addressed in conjunction with the impending disposition of the pending group of DBS applications. *See* note 6, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

A Closed Circuit Test of the
National-Level Interconnecting
Systems and Facilities and
Program Origination Channels
of the Emergency Broadcast
System.

ORDER

Adopted: November 17, 1988; Released: November 29, 1988

By the Managing Director:

1. The Commission has received a request from the Federal Emergency Management Agency and the White House Communications Agency to conduct a Closed Circuit Test of the National-Level interconnecting systems and facilities of the Emergency Broadcast System (EBS) during the week of December 12, 1988.

2. This request has been coordinated with the major radio networks by Mr. Brian Cady of CBS.

3. Coordinated arrangements have been made with the White House Communications Agency, the Federal Emergency Management Agency, the major Radio Broadcast Networks (ABC, AP Radio, CBS, MBS, NBC, NPR, United Stations and UPI Audio) and the American Telephone and Telegraph Company (AT&T).

4. Accordingly, pursuant to authority delegated to the Managing Director in his capacity as Defense Director, IT IS ORDERED that a Closed Circuit Test of the EBS be conducted during the week of December 12, 1988, in accordance with Section 73.962 of the Rules.

5. Authority for the adoption of this action is contained in Section 1, 4(i), 4(o), and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Minkel
Managing Director

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC NORTHWEST
BELL TELEPHONE
COMPANY,
Complainant

v. File No. E-87-34

American Network,
Inc. d/b/a
AMNET,
Defendant.

ORDER

Adopted: November 18, 1988; Released: November 29, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 30, 1987, Pacific Northwest Bell Telephone Company (PNB), a local exchange carrier, filed the above-referenced complaint against American Network, Inc. (AmNet), an interexchange carrier and customer of PNB, alleging that AmNet failed to pay PNB the tariffed rate for interstate access service in violation of Section 201 of the Communications Act, 47 U.S.C. § 201. AmNet denied such allegations and moved to dismiss the complaint.

2. By stipulation and joint motion filed October 31, 1988, the parties advised the Commission that they had reached a mutual settlement of this matter and requested that the complaint be dismissed with prejudice. Since there no longer is a controversy between the parties, we find that it is in the public interest to grant the motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned proceeding IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-424

In the Matter of

Amendment of the maritime services rules to allow ships to use 406.025 MHz emergency position indicating radiobeacons for distress alerting and search and rescue functions. RM-5166

ERRATUM

Released: November 29, 1988

1. On September 9, 1988, the Commission released a Report and Order, in the above captioned proceeding, FCC 88-825, 3 FCC Rcd 5406 (1988). That document inadvertently added footnote 13 in § 80.205 of the Commission's Rules. This error in the APPENDIX is corrected by removing paragraph 4 under "B. Part 80-STATIONS IN THE MARITIME SERVICES" and replacing it with a new paragraph 4 to read as follows:

4. In § 80.205, paragraph (a) is amended by revising the text of footnote 12 to read as follows:

§ 80.205 Bandwidths.

(a) * * *

[12] Applicable to radiolocation and associated telecommand ship stations operating on 154.585 MHz, 159.480 MHz, 160.725 MHz, 160.785 MHz, 454.000 MHz and 459.000 MHz, and to emergency position indicating radiobeacons operating in the 406.000-406.100 MHz frequency band.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

KANSAS CITY YOUTH FOR CHRIST, INC. File No. BRCT-871005KE

For Renewal of License of
Station KYFC(TV)
Kansas City, Missouri

MEMORANDUM OPINION AND ORDER and NOTICE OF APPARENT LIABILITY

Adopted: November 9, 1988; Released: November 29, 1988

By the Commission:

1. The Commission has before it: (i) the above-captioned license renewal application for Station KYFC(TV), filed by Kansas City Youth for Christ, Inc. (licensee); (ii) a petition to deny the application filed January 4, 1988, by the National Black Media Coalition and the United Minority Media Association (hereafter "Petitioners");[1] (iii) the licensee's opposition; (iv) the petitioners' reply; and (v) various related filings.[2] The petitioners allege that the licensee did not comply with the Commission's rules or policies concerning equal employment opportunity. Accordingly, the petitioners request that the Commission investigate the station's employment practices and, thereafter, designate the application for hearing.

2. **PROCEDURAL MATTERS**. With respect to standing, we note that initially, NBMC/UMMA did not file with the petition affidavits or statements under penalty of perjury. On January 28, 1988, the petitioners submitted the statements of Pluria Marshall, Chairman of NBMC and a resident of Silver Spring, Maryland, and M.C. Richardson, President of the United Minority Media Association, and a regular viewer of KYFC(TV). However, the statements were not timely filed and no explanation was provided. The circumstances surrounding the filings reflect a continuing lack of diligence by NBMC in complying with our procedural rules. We have recently addressed NBMC's failure to timely file supporting affidavits for a petition to deny, and have put NBMC on notice that routine late filings for nonsubstantial reasons will not be countenanced. *Florida Television Renewals*, 3 FCC Rcd 1930 (1988). However, since the decision on the Florida television renewals was reached after the instant petition to deny was filed, we will accept the late-filed statements *nunc pro tunc*. *Malrite of New York*, 71 FCC 2d 241, 242 (1979).

3. **PLEADINGS**. The petitioners allege that KYFC(TV) had no more than token employment of blacks and other minorities during the license term. They claim that the station's statistical record shows that only one black was employed as of September 1987, and that minority employees were absent from the station's staff for most of the license term. Concerning the licensee's EEO program, the petitioners contend it is not meaningful. They point out that the program reveals that no recruitment sources were contacted during the twelve months prior to the submission of the 1987 renewal application and that it explicitly states that the station does "not actively recruit employees." [3] Moreover, the petitioners charge that since no recruitment sources are listed, the licensee has failed to propose a program for the coming license term which complies with the Commission's EEO rule. Finally, the petitioners allege that the licensee engaged in religious discrimination and "appears to be excluding all or most non-Christians from employment."

4. In opposition, the licensee refers to the station's annual employment reports, pointing out that it employed a black technician and a black manager from September 1982 through 1983, and that it employed a black technician in 1984. While acknowledging that its 1985 and 1986 employment reports show no minority employees, it notes that it hired two minorities, one of whom is a black female, for technical positions in March 1987. With respect to the station's EEO program, the licensee states that it has "never found it necessary to actively recruit or advertise for qualified employees" because there is very little turnover. Moreover, the licensee indicates that because KYFC-TV "operates on a budget that is derived entirely through donations . . . the station must rely heavily on its unpaid volunteer work force," while "the remainder of the available positions have been filled through review of unsolicited applications." In this regard, the licensee notes that the black female technician hired in 1987 began her career at the station as a volunteer and that both minorities hired in 1987, including the black female technician, were unsolicited applicants. The licensee concludes that "there have been a number of minorities in the volunteer staff over a period of five years" and that from its pool of unsolicited applications it has "found competent help which also falls within the guidelines of the Model Program." Finally, the licensee disputes the petitioners' allegations that it engaged in religious or racial discrimination, noting that its policy, as stated on the station's employment application form, is to make employment decisions without regard to sex, race, color, religion or national origin.[4] It also points out that no complaints alleging discrimination have ever been filed against the station. In view of the above, the licensee concludes that the NBMC/UMMA petition should be denied.

5. In reply, the petitioners argue that the absence of minorities from the station's staff during 1985 and 1986 and the licensee's failure to engage in affirmative efforts to recruit minorities show that the licensee deliberately violated the EEO rule. As to the effectiveness of the licensee's employment practices, the petitioners assert that while the licensee's reliance on volunteers and unsolicited applications may have resulted in minority hires in 1987, the licensee's opposition pleading provided no information concerning the effectiveness of its personnel practices during the period when no minorities were employed. Moreover, the petitioners argue that the licensee's policy of changing volunteer positions to either part-time or full-time positions constitutes racial and religious discrimination. The petitioners note that the licensee provides no information about how many of its volunteers have been minorities. Further, the petitioners contend it is unlikely that non-Christians would volunteer to work for a Christian television station. The petitioners conclude that a

Bilingual investigation[5] is necessary to determine whether the licensee intentionally violated the Commission's EEO rule and engaged in religious and/or racial discrimination.[6]

6. **DISCUSSION**. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates a licensee's efforts to implement its affirmative action program by reviewing all relevant and material information, such as: the composition of the station's workforce; the composition of the local labor force; the description of the station's EEO program and policies, including recruitment and promotion data; and EEO complaints, if any, filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is given to those stations which fail to meet the Commission's internal processing guidelines.[7] In the absence of evidence of discrimination, our primary concern is the broadcaster's efforts. When the evidentiary record indicates that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may require submission of periodic progress reports and/or grant renewal for less than a full term.[8] In less serious cases, the Commission may in its discretion simply issue warnings.

7. The Kansas City, Missouri-Kansas Metropolitan Statistical Area (MSA) includes 43.8% women, 14.0% minorities (10.8% black,[9] 2.1% Hispanic, 0.6% Asian or Pacific Islander and 0.5% American Indian).[10] According to the updated employment report submitted with its renewal application, the station's staff is composed of 20 employees, six (30.0%) of whom are women, one (5.0%) of whom is black and one of whom is Asian/Pacific Islander. The upper-four staff of 17 employees includes four (23.5%) women, and the two minorities.[11] Earlier employment from the 1983-1988 license term reports shows one minority, a black male, employed as a technician in 1984 and two blacks employed in managerial and technical positions in 1983. The reports also show that while the overall representation of women on the staff compared favorably with their representation in the labor force, women were underrepresented, bother overall and in upper-level jobs, throughout most of the license term.

8. KYFC(TV) states in its EEO program that "because it does not have a large turnover, it has never found it necessary to recruit or advertise for new workers." Consistent with this statement, the program reflects no recruitment contacts of any kind. With respect to training, the program shows that two women, one of whom is black, received on-the-job training and moved up to editing and quality control positions. In addition, the station provided general internships to two females and one male; however, the submission does not indicate whether the station selected minorities for any of these internships. During the year prior to the submission of the renewal application, the station hired four persons, two of whom were women and two of whom were minorities. Thus, while the licensee hired, trained and promoted women and minorities, it made no efforts to apprise women's organizations or sources of black and other minority referrals of job openings.

9. As noted, the station's 1985, 1986 and 1987 annual employment reports show an absence of minorities, while the station's 1983-1987 reports show an underrepresentation of women in upper-level positions. Also, the licensee's statements in Sections IV and X of its EEO program (FCC Form 396) indicate that it did not recruit employees. Thus, the staff sent a letter of inquiry to determine what jobs the station filled during the license term, and the race, sex and referral source of those hired. In addition, because a comparison between information submitted with the licensee's EEO program and the 1987 employment report raised a question as to the number of hires reported in its EEO program, the licensee was asked to explain the apparent discrepancy. The petitioners were afforded an opportunity to comment on the licensee's submission. The information submitted by the licensee shows that it had 28 hiring opportunities (19 full-time and nine part-time) during the 1983-1987 license term. Of these hires, two (7.1%) were minorities (both hired full-time), one (3.6%) of whom was a black female Camera Operator, and 10 (35.7%) were women. The applicant data reveal that of the 43 applicants for the 28 positions, four (9.3%) were minorities, three (7.0%) of whom were black, and 13 (30.2%) were women. The three black applicants were a male for a Traffic Manager's position open in 1983 and a female for a secretarial position in 1986, neither of whom were hired, and a female hired as a Camera Operator in 1987. The license also identified the referral source of each of the 43 applicants as: 19 (44.2%) unsolicited, 10 (23.3%) from the Christ Unlimited Bible Institute,[12] six (13.9%) volunteers, five (11.6%) from KYFC(TV) advertisements, two interns and one personal referral. The 28 hires included all 10 referrals from the bible institute, eight unsolicited applicants, six volunteers, two interns, one respondant from its television advertisements, and one personal referral. Finally, the licensee explains that the increase in the size of the station's full-time staff from 14 employees in January 1987 to 20 employees at its renewal filing was due to the four hires noted in its EEO program and the promotion of two part-time employees to full-time status.

10. **DECISION**. Turning first to the petitioners' allegation that the licensee engaged in religious discrimination, we have no evidence showing that the station discriminated against anyone because of his or her religion. In this regard, the petitioners have not supported their allegation of discriminatory religious employment practices and have not come forth with anyone claiming to be adversely affected by the licensee's employment practices. Moreover, the licensee has indicated that its employment policy, as stated on its application form, is to make employment decisions without regard to religion. Thus, petitioners have failed to raise a substantial and material question of religious discrimination. *See King's Garden, Inc.*, 34 FCC 2d 937 (1972), *aff'd King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 410 U.S. 996 (1974).

11. **Employment of Minorities**. The licensee's record indicates that it employed blacks, overall and the top-four categories, in 1983 and 1984, and at the time of the filing of the renewal application. In view of the above, and the size of the station vis-a-vis the available labor force,[13] we do not believe this record raises a substantial and material question of fact of racial discrimination.

12. However, we are concerned that during the 1983-1987 license term, the licensee did not establish, maintain and carry out a positive, continuing program of

EEO efforts pursuant to Commission requirements in this area. Specifically, the record fails to establish *any* efforts made by the licensee to recruit minorities. There is no indication of recruitment contacts or attempts to advertise for any positions, except generally over its own television station. In addition, there is no indication of self-assessment, notwithstanding the complete absence of minorities from employment during the 1985-1987 reporting years and the 19 full-time hiring opportunities. Indeed, the licensee's EEO program submission does not even address its unsuccessful record with respect to black employment.[14] In relatively similar situations, we have granted renewal subject to reporting conditions. *See Arkansas Educational Television Commission*, 3 FCC Rcd 1923 (1988); *National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919 (1988); *Florida Television Renewals, supra; Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd 1907 (1988); and *Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913 (1988). Here, however, we believe that additional steps must be taken for the reasons noted below.

13. Instead of establishing and maintaining an affirmative program reflecting positive and continuing efforts to recruit, employ and promote qualified minorities as required by Section 73.2080 of the Commission's rules, the licensee here appears to have adopted a policy of virtually *zero* efforts in this particular area. Thus, in its own words, "it has never found it necessary to actively recruit or advertise for new workers." This practice is wholly unacceptable because it means that the licensee has no identifiable recruitment sources for minorities and made no efforts to apprise sources of black and other minority referrals of job openings. Given its virtual *no efforts* policy, it is not surprising that the licensee was apparantly unconcerned about the absence of minorities from the station between 1985 and 1987, notwithstanding the existence of significant hiring opportunities (19 full-time positions during the license term). At best, the licensee's employment of minorities at all appears to be purely happenstance. In this connection, 44.2% of its referrals were completely "unsolicited".[15] Based on the licensee's apparent *no efforts* policy and the other matters noted in this paragraph,[16] we believe that a two year short-term renewal, a monetary forfeiture for violation of the Section 73.2080 requirement noted above, and reporting conditions are appropriate sanctions.[17] However, additional deficiencies are noted, *infra*, with respect to women which further buttress our sanction determination.

14. **Employment of Women**. We are equally concerned that the licensee did not establish maintain and carry out a positive, continuing program of EEO efforts with respect to women as required by the Commission's EEO rule. Similar to the licensee's record with respect to minorities, there is no indication that the licensee made *any* efforts to recruit women. In addition, there is no indiction of self-assessment, despite the underrepresentation of women on the station's overall and upper-level staff throughout most of the license term. Here again, the licensee's submissions do not even address its lackluster record with respect to women. While we are mindful that the licensee hired, trained and promoted women during the license term, given the licensee's non-affirmative EEO record, this also appears to be fortuitous.

15. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition and the United Minority Media Association IS DENIED.

16. IT IS FURTHER ORDERED, That the license renewal application for Station KYFC(TV) IS GRANTED FOR A SHORT-TERM ending June 1, 1990, subject to the EEO conditions specified herein.

17. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for forefeiture of10,000 for willful and repeated violations of Section 73.2080 of the Commission's Rules during the February 1, 1983 to February 1, 1988 license term.

18. IT IS FURTHER ORDERED, That the licensee of KYFC(TV) file an original and one copy of the following on August 1, 1989 and with its next renewal application:

(a) For the August 1, 1989 report, a list of all job vacancies during the twelve months preceding July 1, 1989, and for the six months preceeding January 1, 1990 for the renewal application report, a list indicating the job title and full or part-time status of the position, the race or national origin, sex and referral source of each applicant for each job and the race or national origin and sex of the person hired (such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League -selected white female);

(b) a list of employees as of the July 1 payroll period preceeding the August report and the January 1, 1990 payroll period precceding the renewal application report by job title, indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395-B classification, date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

19. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order to each of the parties to this proceeding.[18]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of black organizations and persons seeking additional black employment, program service and ownership in the media. The petition was filed collectively by the national organization and the United Minority Media Association (UMMA), the Kansas City, Missouri affiliate of NBMC.

[2] Also before us are a letter of inquiry from the Commission to the licensee dated February 1, 1988, the licensee's response, and the petitioners' comments. Furthermore, although NBMC withdrew its petition to deny by letter dated June 17, 1988, we have determined that the action rendered herein is warranted.

[3] The petitioners also contend that the licensee's 1982 EEO program did not comply with the Commission's EEO rule. However, the licensee's EEO performance during the 1980-1983 license term was found to be satisfactory, and reconsideration of that decision was not sought within the appropriate period of time. 47 U.S.C. Section 405; Section 1.106 of the Commission's Rules. Accordingly, the petitioners' belated allegation of licensee noncompliance with the Commission's EEO rule during the 1980-1983 license term does not warrant further inquiry. *See also Baltimore Metropolitan Stations*, 89 FCC 2d 1183, 1194 n.17 (1982).

[4] The licensee submitted the affidavits of Ronnie Metsker, Acting General Manager of KYFC-TV, and Susan L. Copling, Program Director of the station, who both state that "KYFC-TV does not hire based on religious faith."

[5] In *Bilingual Bicultural Coalition on the Mass Media Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), the court stated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raises questions as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination. The court made clear, however, that the Commission could gather more information regarding these issues through its own investigation. *Id.* at 630. *See National Black Media Coalition v. FCC*, 775 F.2d 342, 358 (D.C. Cir. 1985). *See* note 6, *infra*.

[6] While we do not agree that the requirements of *Bilingual* have been met in this case (*See* note 5, *supra*), we have nonetheless concluded that additional information is needed from the licensee to better enable the Commission to discharge its responsibilities. Thus, as always, when we believe our discretion should be so exercised, we have conducted an inquiry to obtain additional information about the licensee's recruitment and hiring practices. We provided petitioners with a copy of our inquiry and asked for and received their comments. However, this inquiry did not include matters pertaining to petitioners' allegation of religious discrimination. In this regard, we note that the annual EEO reports and related documents do not require licensees to submit information concerning the religious beliefs of their employees. Thus, those documents do not address the elements of a statistical imbalance and a languishing program that would support an allegation of religious discrimination. Further, the petitioners in this case have failed to raise a substantial and material question of fact that the licensee has engaged in disparate treatment of job applicants because of their religious beliefs.

[7] In *Amendment of Part 73 of the Commissions's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), we stated that all EEO programs would be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[8] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, substantial and material factual questions remain, we will designate the application for hearing. *Id.*

[9] The preliminary statistical analysis results from a comparison of the percentage of *all* minorities on the station's staff with the percentage of *all* minorities in the relevant labor force. *Michael Mathiesen*, 53 RR 2d 997, 1002 (1983); *Storz Broadcasting Co.*, 88 FCC 2d 641, 642 (1981). Because blacks are the dominant minority in the labor force of the challenged station, representing 77.1% of the minorities in the relevant market, and their treatment is the focus of the petition to deny, our principal concern is with the station's efforts with respect to blacks. *Bilingual*, *supra*, at 625; *Pyle Communications of Beaumont*, 2 FCC Rcd 1793 (1987), *appeal filed sub nom. Beaumont Branch of the NAACP and National Black Media Coalition v. Federal Communications Commission*, No. 87-1188 (D.C. Cir. April 27, 1987); *Metroplex Communications of Florida, Inc.*, 96 FCC 2d 1090 (1984). Of course, we also examine a licensee's EEO submissions to assure ourselves that appropriate affirmative efforts were made with respect to all minority group members and women.

[10] The labor data was obtained from the EEOC's Office of Program Research "1980 Census Data Report."

[11] The licensee states in its opposition pleading that subsequent to the filing of its renewal application the station's full-time staff decreased from 20 employees to 17 employees. It notes, however, that the two minority employees hired in March 1987 remain employed by the station.

[12] The licensee states that the ministry, Kansas City Youth for Christ, has a nine-month training course for youth workers. It calls the course the Christ Unlimited Bible Institute.

[13] The station's overall employment ranged from a low of 13 in 1984 to a high of 20 at the time of the filing of the renewal application. The average yearly employment during the renewal period was 15.8 persons. Thus, the station size is relatively small. In this regard, we also note that minorities constitute 14.0% of the labor force, while blacks, the dominant minority here, constitute 10.8% of that labor force. Accordingly, on average, the station would need only one black employee to achieve 50.0% parity, if that were the governing test, or two black employees to achieve 100% parity.

[14] In fact, the only acknowledgement of the success or failure of its employment of minorities is in Section X of the licensee's EEO program (FCC Form 396), where it is concluded that an adequate number of minority applicants are being produced through its pool of unsolicited applicants.

[15] Both of the minorities reflected in the full-time employment profile as of the filing of the renewal application were "unsolicited" applicants. *See* para. 4, *supra*.

[16] We also note that all or virtually all of the licensee's full-time employees are reported as upper-four employees. Accordingly, we admonish the licensee to review its job classifications to ensure proper categorization. *See Carolina Christian Broadcasting Inc.*, *supra* at 1908.

[17] We note that the licensee amended its renewal application EEO program on June 6, 1988. The amendment, filed four months after the Commission initiated its inquiry into the station's EEO practices and five months after the filing of the petition to deny, states that the licensee "plans to contact" minority recruitment sources, such as the Urban League's Minority Skills Bank, the United Minority Media Association, and the NAACP; employment services; and area schools and colleges with significant minority and female enrollments. The licensee indicated that it "currently" places employment advertisements in area newspapers and Broadcasting Magazine. Furthermore, the licensee notes that of the two persons hired from September 1, 1987 to May 1, 1988, one was a minority and one was a female. While such efforts are encouraging because the licensee has belatedly began to recognize its responsibilities under our rules, we do not believe that it obviates the need for remedial action. In accordance with *Rust Communications Group, Inc.*, 73 FCC 2d 39 (1979), we have concluded that consideration of post-term efforts is inappropriate because of the lack of an EEO program during the license term.

[18] The licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division for information on the preparation of employment reports at (202) 632-7069. In this

regard, we advise the licensee that it need not submit the names of the persons referenced in its report; the information requested will suffice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

GE AMERICAN COMMUNICATIONS, INC. File Nos. 1970-DSS-MP/ML-86, 1971-DSS-MP/ML-86, 1972-DSS-MP -86

For Modification of Space Station Authorizations in the Domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 1988; Released: November 29, 1988

By the Commission:

INTRODUCTION AND SUMMARY

1. This order addresses responses to the Commission's *Tentative Decision* [1] concerning the above referenced applications of GE American Communications, Inc. (GE Americom).[2] For the reasons set forth below, we reaffirm the concept of arc segmentation proposed in the *Tentative Decision*, modify the plan proposed to implement it, reject the proposal to require closer orbital spacings within the designated arc segment, and deny the modification request of GE Americom.

2. This proceeding had its origins in 1986 when GE Americom requested authority to redesign its K-3 satellite and its ground spare K-4 satellite. These satellites, designed to operate in the 12/14 GHz frequency bands, were initially authorized in 1983 and K-3 was assigned to the 85° West Longitude (W.L.) orbital location. [3] GE Americom subsequently sought to modify these authorizations to allow it to construct both satellites and to operate K-3 with 60 watt traveling wave tube amplifiers (TWTAs) and transponders capable of operating either with 27 MHz or 54 MHz of usable bandwidth using two half-CONUS[4] coverage beams. GE Americom stated that all of K-3's capacity would be used for the distribution of video program services. Several satellite operators objected to the GE Americom request, asserting that K-3's proposed operation would cause unacceptable interference into neighboring lower power density satellites. The Commission encourages and prefers domestic satellite operators to resolve coordination difficulties, since they can best weigh the technical and economic tradeoffs involved in changes in orbital locations and operating parameters. We do not become involved unless the parties are unable to reach an agreement.[5] The affected domestic satellite operators were unable to reach an agreement that would accommodate GE Americom's request.

3. Because the parties could not reach agreement, we developed the proposal in the *Tentative Decision*. We sought both to resolve the immediate controversy of accommodating the K-3 satellite proposal and to address the broader problem of how to accommodate other 12/14 GHz high power density satellites within the geostationary fixed-satellite orbital arc. Specifically, we proposed to use a discrete segment of the orbital arc to isolate high power density satellites that can not be easily accommodated in other portions of the arc. Within the designated arc segment, K-3 and similar satellites would have been permitted to operate at power levels and with technical configurations limited only by what could be coordinated domestically and internationally. We proposed that a high power density arc segment from 87° to 93° W.L. be established. We chose this segment because only one 12/14 GHz satellite that was in-orbit and assigned to this segment -- Satellite Transponder Leasing Corporation's (STLC's) SBS-4 satellite -- would have had to be relocated.[6] We also proposed to space the 12/14 GHz satellites in the high power density arc with 1.5° separations to increase the number of satellites that could be accommodated. In order to implement the plan, we proposed to reassign K-3 to 91.5° W.L. from 85° W.L. and to relocate SBS-4 from 91° W.L., where it is currently operating, to 85° W.L. We solicited public comment on the proposal.[7]

4. Generally, the commenters expressed reservations regarding the tentative proposal. The comments can be grouped into three categories: (1) those that oppose the proposal because it requires relocating SBS-4, (2) those that specifically oppose the use of the 87°-93° W.L. arc segment because they believe that it precludes the operation of traditional lower power density satellites and services from a prime orbital arc segment, and (3) those that support the concept of arc segmentation but not our proposal to impose 1.5° separation within the high power density segment.

5. In light of these comments and a change in circumstances since the *Tentative Decision* -- *i.e.*, the relinquishment of several domestic satellite licenses in the past several months -- we adopt an approach suggested by several of the commenters. Specifically, in this order, we designate an eastern segment at 75°-79° W.L. and a western segment at 132°-136° W.L. as the high power density arcs. Because GE Americom asserts it will not operate outside of the 85°-106° W.L. orbital arc, we deny GE Americom's modification request to operate a high power density satellite at 85° W.L. SBS-4 can therefore remain at its current 91° W.L. location. Finally, we maintain 2° separations in the high power arc segment and therefore do not require adjacent high power density 12/14 GHz satellites to be cross-polarized.

DISCUSSION

A. The Concept of Arc Segmentation

6. In order to accommodate newer, high power density satellites, we proposed in our *Tentative Decision* to delineate a specific portion of the arc where these satellites could be located. The commenters generally support the concept of demarcating a portion or portions of the arc for high power density satellites.[8] We therefore adopt arc segmentation as the general framework for accommodating these satellites. As we stated in the *Tentative Decision*, we believe that isolating these satellites in this way will avoid, on a long term basis, the interference problems inherent in locating higher power density satellites adjacent to lower power density satellites. We agree with Comsat Video that arc segmentation "improve[s] orbit-spectrum utilization in frequency bands where satellites can operate with significantly different [powers]."[9] This

approach is simply an extension of the Commission's traditional policy to consider satellite design as a factor in assigning orbital locations to newly authorized satellites.[10]

B. Implementing Arc Segmentation

7. In the *Tentative Decision*, we proposed to designate 87°-93° W.L. as the high power density arc segment. When we examined the geostationary arc, we found several high power density arc segment "candidates," but none appeared to satisfy our criteria of minimal satellite reassignments and minimal in-orbit relocations as well as the 87°-93° W.L. arc segment. This segment required the relocation of only one in-orbit satellite -- SBS-4 -- and no reassignments of unlaunched satellites. Other 6° segments would have required additional relocations and reassignments.

8. With the exception of GE Americom and HBO, the commenters oppose the 87°-93° W.L. arc for high power density satellites. STLC and its customers on SBS-4 oppose any relocation of SBS-4 from 91° W.L.[11] STLC notes that several of its customers, including Wal-Mart, ASTN, EDS, MCI and Hughes Communications Services, operate networks of very small aperture terminals (VSATs). It states that thousands of antennas would need to be repointed if SBS-4 must move. STLC, supported by these customers, estimates the cost of repointing these antennas, and the concomitant disruption in services, at 20-40 million. They conclude that relocating SBS-4 may damage the fledgling VSAT industry by imposing unacceptable and unexpected costs and by deterring further capital investment.[12]

9. Other commenters oppose the 87°-93° segement we proposed in the *Tentative Decision* because they claim that it precludes lower power density satellites from operating in a prime orbital arc capable of providing 50-state coverage.[13] These commenters argue that the 87°-93° W.L. arc segment should remain for the use of traditional satellites and that the burden of technical compromise should be borne by the entities that propose a new, non-compatible service or satellite. As an alternative to the proposal in the *Tentative Decision*, several commenters suggest that the high power density arc segment should be bifurcated, with a segment at either end of the traditional geostationary arc.[14] Several commenters argue that GE Americom is providing essentially a Direct Broadcasting Satellite (DBS) service and should be required to implement its fifty state coverage as other DBS providers do -- to serve the eastern U.S. through a satellite located in the eastern portion, and the western U.S. (including Hawaii and Alaska) from a satellite located in the western portion of the geostationary arc.[15]

10. GE Americom, in contrast, asserts that the 87°-93 ° W.L. arc segment would ensure operators of high power density satellites 50-state coverage from a single location. It asserts that assignment to a location east of 85° W.L. or west of 106° W.L. would violate provisions in its contract with Crimson Satellites Associates (CSA),[16] which has agreed to buy the K-3 satellite contingent on Commission approval. In fact, GE Americom flatly states that "an assignment of K-3 outside the 85° to 106° W.L. orbital arc would not be acceptable to GE Americom or its customers."[17]

11. In deciding how best to accommodate GE Americom's K-3 satellite or some other high power density satellite, we attempt to balance the strong public interest in minimizing disruption and expense to existing satellite service and the potential public benefit of new services. We seek to avoid relocating operating satellites, if at all possible, while allowing the benefits of a new, but somewhat incompatible, technology to be made available to the public.[18]

12. When we were initially evaluating the options for potential high density arc segments, it appeared that some repositioning of existing satellites was unavoidable and we could only minimize, not eliminate, that result. However, since that time, several domestic satellite licensees have relinquished their authorizations. This has provided us with unencumbered portions of the arc that may be considered for the high power density segment. The availability of these segments means there no longer is a need to use the 87°-93° W.L. segment for high power density satellites and to require SBS-4 to relocate. Unencumbered segments exist in both the eastern and western portions of the arc.

13. In particular, no 12/14 GHz satellites are currently operating in the 71°-79° W.L. and the 130°-136° W.L. portions of the arc.[19] Given the existence of these unencumbered segments and the support in the record for a bifurcated high power density arc segment, we will designate 4° segments in each of these portions for high power density satellites. Specifically, the 75°-79° W.L. and 132°-136° W.L. segments are designated as the high power density arc. We believe that these can accommodate high power density satellites and allow us to maintain sufficient orbital locations to accommodate satellites employing more traditional technology.[20]

14. We recognize that it may not be possible to provide the quality of service desired to all 50 states from single locations within these segments, although service to most states is feasible.[21] However, we conclude that the20-40 million cost to current SBS-4 users if SBS-4 were required to relocate far outweighs the opportunity cost high power density licensees may experience in having to settle for less than optimal 50-state coverage.[22] Existing services must receive strong consideration vis-a-vis new entrants to ensure reasonable stability and to promote capital investment in the satellite services. Thus, we conclude that bifurcating the high power density arc into these eastern and western segments would best balance the desire of high power density satellite licensees to provide 50-state coverage and the desire of existing licensees to provide uninterrupted service to their customers.

C. Spacing Within the Arc Segment

15. In our *Tentative Decision*, we proposed to require 1.5° separation and cross-polarization between adjacent satellites within the high power density arc segment. We proposed these reduced spacings to accommodate additional satellites. Moreover, our analysis indicated that small antennas (typically 1.8 meters), similar to the type GE Americom proposed to use, could better distinguish between a desired signal and an interfering signal from a satellite 1.5° away than from a satellite 2.0° away. We also recognized, however, that 1.0 meter antennas would not be able to operate with these reduced spacings and that adjacent satellites would be required to be cross-polarized and to employ uniform transponder plans. The commenters urge the Commission not to adopt 1.5° spacing, primarily because it would eliminate 1.0 meter antennas. The commenters also argue that imposing a standard transponder plan on the industry -- even if it were in a high power density arc segment -- would be too constraining.

16. We conclude that 1.5° separations and adjacent 12/14 GHz satellite cross-polarization in the high power density arc are not appropriate at this time. These reduced separations will prevent 1.0 meter antennas from being used and may present satellite operators with higher design, equipment and coordination costs than we initially expected. Further, because of the number of domestic satellite licenses relinquished in the past year, there is no present requirement to reduce spacing in order to accommodate more satellites.[23] Thus, we maintain 2° separations in both segments of high power density orbital arc. Two degree spacing also eliminates the need to require adjacent 12/14 GHz high power density satellites to be cross-polarized.

D. Miscellaneous

17. GE Americom's technical modification proposal contained various requests in addition to those addressed above. We grant GE Americom's request for transponder sales authority for all the transponders on the K-3 satellite. No petitions or comments opposing this request were filed. We find GE Americom's proposed transaction is noncommon carrier in nature and is otherwise consistent with the Commission's transponder sales policies.[24] Finally, in consideration of the length of this proceeding, we grant GE Americom extensions of the construction completion and launch dates for its K-3 satellite until April 30, 1989 and October 30, 1989, respectively.

ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that GE American Communications, Inc.'s request to modify the technical parameters of its Satcom K-3 and K-4 satellites, Application File No. 1970-DSS-MP/ML-86, IS DENIED.

19. IT IS FURTHER ORDERED that Application File No. 1971-DSS-MP/ML-86 IS GRANTED and GE American Communications, Inc. IS AUTHORIZED to offer all the transponders on its Satcom K-3 satellite on a noncommon carrier basis.

20. IT IS FURTHER ORDERED that Application File No. 1972-DSS-MP-86 IS GRANTED and the schedule for implementation of the Satcom K-3 satellite specified in *RCA American Communications, Inc.*, 94 FCC 2d 441 (1983), IS MODIFIED as follows:

	Construction Completed	Launch No Later Than
Satcom K-3	April 1989	October 1989

21. IT IS FURTHER ORDERED that *Assignment of Orbital Locations*, 50 Fed. Reg. 35228 (August 30, 1985), as modified in *Comsat General Corporation*, 2 FCC Rcd 4570 (1987) and *Comsat General Corporation*, 3 FCC Rcd 4071 (1988), IS MODIFIED to to reassign the GSTAR III satellite from 136° W.L. to 124° W.L. effective 30 days from the release of this *Order*.

22. IT IS FURTHER ORDERED that the orbital assignment policies regarding the establishment of a bifurcated high power density arc described herein ARE ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] RCA American Communications, Inc., 3 FCC Rcd 346 (1988) 53 Fed. Reg. 03056 (February 3, 1988) (*Tentative Decision*).

[2] The application was originally filed in the name of RCA American Communications, Inc. (RCA). Since that time RCA has become GE American Communications, Inc.

[3] *See* RCA American Communications, Inc., 94 FCC 2d 441 (1983); Domestic Fixed-Satellite Service, 50 Fed. Reg. 35228 (August 30, 1985) (1985 Orbit Assignment Order). For a more detailed discussion of the chronology of this proceeding, *see* the *Tentative Decision*.

[4] CONUS stands for "contiguous United States."

[5] *See, e.g.*, 1985 Orbit Assignment Order, *supra* note 3; Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983), *recon.* FCC 84-32 (February 2, 1984), *further recon.* FCC 84-181 (May 15, 1984) (1983 Orbit Assignment Order).

[6] Although GE Americom's K-1 satellite is currently operating at 85° W.L., GE Americom stated that it would move this satellite to its assigned 67° W.L. location when K-3 was launched. *See* Modification Application at 6, note 5.

[7] Comments and/or replies were filed by Advanced Communications Corporation (ACC), American Satellite Company (Contel ASC), American Telephone and Telegraph Company (AT&T), Associated Press (AP), Automotive Satellite Television Network (ASTN), CBS, Inc., Comsat General Corporation (Comsat General), Comsat Video Enterprises, Inc. (Comsat Video), Cylix Communications Corporation (Cylix), Electronic Data Systems Corporation (EDS), GE Americom, GTE Spacenet Corporation (GTE Spacenet), Home Box Office, Inc. (HBO), Hughes Communications Galaxy, Inc. (Hughes), MCI Communications Corporation (MCI), Microspace Communications Corporation (Microspace), Public Broadcasting Service (PBS), Salomon Brothers Holding Company, Inc. (Salomon Brothers), Satellite Broadcasting and Communications Association of America (SBCAA), Satellite Transponder Leasing Corporation (STLC), Southland Corporation (Southland), USTV Limited Partnership (USTV), Vitalink Satellite, In. (Vitalink), Walgreens Company (Walgreens) and Wal-Mart Stores, Inc. (Wal-Mart).

[8] *See, e.g*, Comments of Contel ASC, Comsat Video, GE Americom, and HBO. In addition, STLC and GTE Spacenet suggest alternative orbital assignment plans that incorporate high power density arc segments. Although CBS states that arc segmentation is premature at this time, we disagree. Several applications for high power density satellites are pending at the Commission to be considered as part of the current domestic fixed-satellite processing group. GE Americom has an application on file in which it requests authority to construct and launch new high power density satellites. Application File No. 6012-DSS-P/LA-87. National Exchange Satellite, Inc. also requests authority to construct and launch new high power density satellites. Application File Nos. 6022/6023-DSS-P/LA-87. Arc segmentation will allow us to accommodate these satellites more efficiently.

[9] Comsat Video Comments at 3.

[10] *See* 1985 Orbital Assignment Order, *supra* note 3, at para. 3; 1983 Orbital Assignment Order, *supra* note 5, at para. 4.

[11] *See* Comments of AVC, ASTN, EDS, MCI, Southland, STLC, Vitalink, Walgreen, Wal-Mart. Other domestic satellite licensees also object to any plan that would require the relocation of an in-orbit satellite. *See* comments of Hughes, GTE Spacenet.

[12] *See also* reply comments of Salomon Brothers.

[13] *See, e.g.*, comments of GTE Spacenet, AT&T, Contel ASC, Hughes.

[14] *See, e.g.*, comments of GTE Spacenet, STLC, Contel ASC.

[15] *See, e.g.*, reply comments of AT&T.

[16] CSA is a joint venture of HBO Satellites, Inc., a subsidiary of HBO, and RCA American Communications Venture, Inc., a subsidiary of GE Communications, Inc.

[17] Comments and reply comments of GE Americom.

[18] While several commenters argue that GE Americom is proposing, in essence, a DBS service that may be authorized in the DBS frequency bands, we believe GE Americom's proposal to provide subscription, satellite-to-home video services is a permissible use of the fixed-satellite service frequencies. We have consistently approved new services in the fixed-satellite frequencies as technology has evolved. *See, e.g.*, Routine Licensing of Large Networks of Small Antennas, 51 Fed. Reg. 15067 (April 22, 1986). In fact, the Commission has previously permitted video programming services to be provided to small home receiving antennas in the 12/14 GHz fixed-satellite band. *See* GTE Satellite Corp., FCC 82-379 (released August 6, 1982), *recon. denied* FCC 83-271 (released June 23, 1982), *aff'd in part*, United States Satellite Broadcasting Co. v. FCC, No. 83-1693 (D.C. Cir. 1984). Such services are properly classified as fixed point-to-multipoint services. *See In the Matter of Subscription Video* 2 FCC Rcd 1001 (1987), *aff'd National Association for Broadcasting v. FCC* 849 F. 2d 665 (1988). Moreover, the proliferation of "backyard" satellite antennas, together with the changes in the Communications Act which permit receipt of satellite-delivered services directly by customers (*see* 47 U.S.C. § 705), indicates that direct-to-home satellite-delivered programming is a permissible fixed-satellite service. Finally, our decision today will permit a satellite operator to provide its high power density services in the fixed-satellite frequency bands without disrupting any existing fixed-satellite services.

[19] The only satellites assigned to these segments are GTE Spacenet's GSTAR III satellite, which is assigned to 136° W.L., and Comsat General Corporation's SBS-1 and SBS-2 satellites, which are currently co-located at 99° W.L., but are assigned to 75° W.L. GTE Spacenet, however, has been granted temporary authority to locate GSTAR III at 124° W.L., and the satellite was launched into that location. *See* Letter from Chief, Domestic Facilities Division to Counsel, GTE Spacenet (April 22, 1986). In light of today's action, we reassign GSTAR III to 124° W.L. We recognize that this assignment will ultimately be changed by 1° to 125° W.L. to implement the recent trilateral arrangement among the U.S., Mexico, and Canada. Although the SBS-1 and 2 satellites are assigned to a location in the eastern high density arc, their license terms will have expired by the time any adjacent high power density satellites are launched. If any useful life remains on SBS-1 or SBS-2 at that time, we will entertain a request for reassignment, on a temporary basis, to another orbital location.

[20] Should additional locations for high power density satellites be needed in the future, we will consider expanding the 4° segments if possible.

[21] The elevation angles of earth stations at the easternmost and westernmost parts of the United States to satellites in these portions of the arc may be too low to permit maximum quality service to all 50 states.

[22] By operating one high power density satellite in each portion of the arc, operators could make maximum quality service available throughout the 50 states.

[23] In addition, a large number of applications for hybrid satellites (satellites that operate both in the 4/6 and 12/14 GHz frequency bands) were filed in the current domestic fixed-satellite processing group. Reducing spacing in the 12/14 GHz band, with no accompanying change in the 4/6 GHz band, would reduce the number of hybrid satellites that could be accommodated in this portion of the arc.

[24] *See* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub* nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., 51 Fed. Reg. 24223 (July 1, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-299

In the Matter of

Amendment of Section 73.202(b),	RM-5789
Table of Allotments,	RM-6253
FM Broadcast Stations.	
(Rozel and Ness City,[1]	
Kansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1988; Released: November 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. In response to a petition filed by Lee E. Scott (Scott), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 4710 (1987), proposing the allotment of FM Channel 254A at Rozel, Kansas, as that community's first FM broadcast service. In response to the *Notice* Dennis Franz filed comments and a counterproposal.[2] Supporting comments were filed by Scott, restating his intention to operate a radio station in Rozel. Reply comments were filed by Scott and Franz.

2. The counterproposal filed by Franz requests the allotment of FM Channel 254A to Ness City, Kansas, as that community's first FM broadcast service. In support of his proposal, Franz states that Ness City has a population of 1,769 and is the county seat of Ness County, with a population of 4,498, whereas Rozel has a population of only 219. According to Franz, Rozel is served by KVGB-FM, Great Bend, Kansas, and by KANS(FM) and KQDF-FM, Larned, Kansas, both providing signals with a strength in excess of 1 mv/m, whereas Ness City does not receive any FM signals with a strength in excess of 1 mv/m. According to Franz, the closest signal comes from Hays, Kansas, 71 kilometers to the north of Ness City. Franz states that no radio Station directly serves Ness City or Ness county.

3. In reply comments Scott states that Rozel, Kansas, is an incorporated town, has an elected mayor and town council and a U.S. Post Office, and all attributes of a community. Further, Scott states that Rozel is a commercial center for the surrounding agricultural area, and that it has two grain elevators and a feed mill and various other service business located in the town, all indicating that Rozel is a qualified community deserving of an FM radio station. According to Scott, it is unnecessary to select between the two communities for allotment of an FM channel as there are approximately ten other Class A channels that could be allotted to Ness City without causing a conflict with his proposal to allot Channel 254A to Rozel. Scott takes no position on whether any allotment to Ness City should be made but suggests there are many opportunities to do so without using Channel 254A.

4. After consideration of the information filed in this proceeding, we find it would be in the public interest to allot Channel 254A to Rozel, Kansas, as that community's first local FM broadcast service. As stated in the *Notice*, Channel 254A can be allotted to Rozel in compliance with the minimum distance separation requirements of the Commission's Rules. [3]

5. In response to the counterproposal filed by Dennis L. Franz, a staff engineering analysis confirms that there are other Class A channels available for allotment to Ness City. We believe the public interest would be served by the allotment of FM Channel 285A to Ness City, Kansas. Channel 285A can be allotted to Ness City in compliance with Section 73.207(b) of the Commission's Rules.[4]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Ness City, Kansas	285A
Rozel, Kansas	254A

7. The window period for filing applications for Channel 285A at Ness City, Kansas and Channel 254A at Rozel, Kansas, will open on **January 18, 1989,** and close on **February 17, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of the counterproposal was given on February 5, 1988, Report No. 1711 (RM-6253).

[3] The coordinates for Channel 254A at Rozel, Kansas are 38-11-42 and 99-24-24.

[4] The coordinates for Channel 285A at Ness City are 38-27-06 and 99-53-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-242

In the Matter of

Amendment of Section 73.202(b), RM-5604
Table of Allotments,
FM Broadcast Stations.
(Bastrop, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1988; Released: November 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 4231 (1987), issued at the request of North Delta Broadcasting, Inc. (petitioner), licensee of Station KTRY-FM, Channel 232A, Bastrop, Louisiana, proposing the substitution of Channel 230C2 for Channel 232A at Bastrop. The *Notice* also proposed the modification of the station's license to specify operation on the higher class channel. In response to the *Notice*, Edward Rauscher Partridge (Partridge),[1] licensee of AM Station KDMS and FM Station KLBQ, Channel 257A at El Dorado, Arkansas, filed an unacceptable counterproposal requesting the substitution of Channel 258C2 for Channel 257A at El Dorado. Radio U.S.A., Ltd. (Radio U.S.A.), licensee of Station KCOZ(FM), Channel 261A at Shreveport, Louisiana, filed comments.[2] Petitioner filed late comments reiterating its intention to construct the improved facilities. Petitioner's late-filed comments were accompanied by a motion for acceptance of "Comments Out of Time." Radio U.S.A. opposed petitioner's request for acceptance. Although the Commission's policy is not to accept late-filed expressions of interest in contested proceedings, that policy does not apply if the proceeding is contested because other parties have advanced alternative proposals for use of the frequency, and those alternative proposals are not acceptable for procedural or substantive reasons unrelated to the pendency of the original petitioner's proposal. *Compare Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988) *with Ocilla, Georgia*, 3 FCC Rcd 4765 (1988). In view of the fact that Radio U.S.A.'s and Partridge's proposals are unacceptable for reasons unrelated to the pendency of petitioner's proposal, we have accepted petitioner's comments for consideration herein in order to permit the petitioner to express a continuing interest in the proposal. However, in accordance with Section 1.415(d) of the Commission's Rules, we consider all other late-filed pleadings by the petitioner to be unauthorized. Inasmuch as the late-filed pleadings did not include any information relevant to our decision making process they will be given no further consideration herein.

2. In its counterproposal, Partridge suggested the substitution of Channel 241A for Channel 258A at Ruston, Louisiana, and Channel 230A for Channel 258A at Hamburg, Arkansas, in order to accomplish the substitution of Channel 258C2 for Channel 257A at El Dorado.

3. In the *Notice* we stated that "finalization of this proceeding is however contingent upon the outcome of a case currently pending before the U.S. Court of Appeals for the District of Columbia which seeks among other actions to substitute Channel 231A for Channel 258A at Ruston, Louisiana." *See James A. Reeder* v. *FCC & USA*, Case No. 86-1045 (D.C. Cir., filed January 21, 1986). The Ruston substitution, which we previously denied, is necessary in order to accomplish the substitution of Channel 259C1 for Channel 261A at Shreveport, Louisiana, and conflicts with the Bastrop proposal. Radio U.S.A., in its comments, urges that the Bastrop proposal be held in abeyance pending the outcome of the judicial appeal.

4. Radio U.S.A. argues that a conditional grant of the Bastrop upgrade proposal would be "premature, potentially meaningless, and could prejudice the final resolution" of the earlier Shreveport proceeding. Radio U.S.A. contends that until the appeal is resolved any action taken herein is a "waste of time and resources of both potential petitioners and the Commission."

5. In regard to the Partridge's counterproposal, the suggested substitution at Hamburg conflicted with the Bastrop proposal. However, because the Ruston and Hamburg channels were allotted in MM Docket No. 84-231, certain restrictions applied when proposing substitution of those channels. Namely, the Commission determined that the vacant channels would not be the subject of a substitution prior to the closing of the application window for the allotment unless the Commission's original decision was in error or a compelling need for the substitution is demonstrated. *See Memorandum Opinion and Order*, 50 FR 47391 (November 18, 1985), *recon. denied, Memorandum Opinion and Order*, 51 FR 36401 (October 10, 1986). The desire to upgrade the current service of Station KLBQ at El Dorado does not constitute a compelling need. Therefore, the counterproposal was unacceptable. The counterproposal is also procedurally defective since it was submitted prior to the opening and closing of the windows. Windows for both communities opened on December 8, 1987, and closed on January 14, 1988. Therefore, the counterproposal will be given no further consideration.[3]

6. We believe that our procedure of making a conditional grant is not a "waste of time and resources of both potential petitioners and the Commission." As we have stated in the *Report and Order* in MM Docket No. 87-73 *supra* and *Atlanta, Texas*, 3 FCC Rcd 2180 (1988), both cases in which Radio U.S.A. has raised a similar claim:

> "The conditional grant enables the Commission to close expeditiously a proceeding substituting a new channel and modifying an existing license. This procedure facilitates the efficient transaction of Commission business and conserves resources which would be expended in maintaining a rule making proceeding in pending status over a prolonged period of time. We also disagree with the assertion that our action could "prejudice the final resolution of the earlier proceeding" involving an upgrade at Station KCOZ. In the event that Reeder is successful at

the Court of Appeals, returning the Atlanta upgrade proceeding to pending status would, in fact, be mandated by the Court Action."

In addition, we note that Radio U.S.A.'s request amounts to a request for a stay, yet Radio U.S.A. has not demonstrated likelihood of success on the merits of its appeal, irreparable harm in the absence of a stay, lack of harm to third parties as a result of a stay or that a stay would serve the public interest. Here we shall grant the Bastrop upgrade contingent upon the outcome of the *Reeder* appeal, rather than delay resolution of this proceeding pending the appeal's outcome.

7. After careful consideration of the aforementioned, we conclude that the public interest would be served by the allotment of Channel 230C2 to Bastrop, Louisiana, as a substitute for Channel 232A. The community could receive its first wide coverage area FM station. The channel substitution can be made consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[4]

8. As requested, we have authorized the modification of Station KTRY-FM to specify operation on Channel 230C2 in accordance with the provisions of Section 1.420(g) of the Commission's Rules. However, this modification is expressly conditioned on the outcome of the appeal, *James A. Reeder v. FCC and USA*, Case No. 86-1045.

9. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bastrop, Louisiana	230C2, 261A, 277A

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of North Delta Broadcasting, Inc., for Station KTRY-FM, Bastrop, Louisiana, IS MODIFIED effective **January 17, 1989,** to specify operation on Channel 230C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly Lowery Broadcasting Company.

[2] Formerly James A. Reeder held the license for Station KCOZ. In MM Docket No. 84-231, Reeder advanced a counterproposal to substitute Channel 259C1 for Channel 261A at Shreveport and modify the license of Station KCOZ to specify operation on the higher class channel. In order to accomplish the Shreveport proposal the substitution of Channel 231A for Channel 258A at Ruston, Louisiana, was required.

[3] Partridge also advanced its proposal in a separate proceeding, MM Docket No. 87-73. That proposal was also denied as procedurally defective in the context of that proceeding. *See Report and Order*, 3 FCC Rcd 4840 (1988).

[4] The reference coordinates are 32-46-48 and 91-54-48. We note that the upgrade may be accomplished at the petitioner's licensed site at coordinates 32-49-10 and 91-54-29. However, petitioner has specified its desire to utilize a site 13.4 kilometers (8.3 miles) north of the city at coordinates 32-54-00 and 91-54-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-15

In the Matter of

Amendment of Section 73.202(b),	RM-6104
Table of Allotments,	RM-6333
FM Broadcast Stations.	RM-6334
(Poplar Bluff, Campbell, and Ellington, Missouri[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1988; Released: November 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. In response to a petititon filed by James M. Hunt (Hunt), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 532 (1988), proposing the allotment of FM Channel 278C2 to Poplar Bluff, Missouri, as that community's fourth FM broadcast service. In response to the *Notice* two counterproposals were filed.[2] Richard DeAnglis requested the allotment of FM Channel 278A to Campbell, Missouri and Saul Waksman requested the allotment of Channel 278A to Ellington, Missouri. Hunt filed comments in response to the *Notice*, restating his intention to file an application for Channel 278C2 at Poplar Bluff. Hunt also filed reply comments in response to the counterproposal. No other comments were received.

2. The counterproposal filed by Richard DeAnglis (DeAnglis) requests the allotment of FM Channel 278A to Campbell, Missouri. According to DeAnglis Channel 278A could provide Campbell, a community of 2,134 according to the 1980 census, with its first local FM broadcast service. DeAnglis provided an engineering analysis and stated he will apply for Channel 278A at Campbell.

3. Saul Waksman (Waksman), in his counterproposal, requested the allotment of Channel 278A to Ellington, Missouri. Waksman stated that Channel 278A at Ellington could provide it with its first local FM service and that he would file an application for the channel.

4. Hunt, in his reply comments, continues to support the allotment of Channel 278C2 to Poplar Bluff, Missouri, as that community's fourth FM service. Hunt states that he does not question the needs of Campbell or Ellington for a local FM broadcast service but indicates that it is possible to meet these needs and still provide an additional service for Poplar Bluff. Hunt demonstrates in his engineering analysis that Channel 280A can be allotted to Ellington, Missouri, without a site restriction, while Channel 298A can accommodate the needs of Campbell, Missouri, with a site restriction. Further, the allotment of these alternate channels to Campbell and Ellington will leave Channel 278C2 available for allotment to Poplar Bluff. Therefore, Hunt requests the Commission to allot Channel 278C2 to Poplar Bluff, Channel 280A to Ellington and Channel 298A to Campbell, allowing all three communities the opportunity for a new service.

5. We believe the public interest would be served by the allotment of FM Channel 278C2 to Poplar Bluff, Missouri, as that community's fourth FM Broadcast service. Channel 278C2 can be allotted to Poplar Bluff consistent with the Commission's spacing requirements provided there is a site restriction 10.9 kilometers (6.8 miles) northeast.[3] The site restriction will prevent a conflict with Station KWOZ, Channel 277C, Mountain View, Arkansas. In response to the counterproposals, we believe it would be in the public interest to allot a channel to each community. Channel 280A can be allotted to Ellington, Missouri, in compliance with Section 73.207 of the Commission's Rules at the city reference coordinates.[4] Channel 298A can be allotted to Campbell, Missouri, with a site restriction 7.3 kilometers (4.5 miles) northeast of the community.[5] The site restriction will prevent a conflict with Station KKTZ, Channel 298C1, Mountain Home, Arkansas, and an application for Channel 300C, Station KFIN, Jonesboro, Arkansas.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Campbell, Missouri	298A
Ellington, Missouri	280A
Poplar Bluff, Missouri	233C1, 238C1, 244A, 278C2

7. The window period for filing applications for Channel 298A at Campbell, Missouri, Channel 280A at Ellington, Missouri and Channel 278C2 at Poplar Bluff, Missouri, will open on **January 18, 1989,** and close on **February 17, 1989.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Campbell and Ellington, Missouri, have been added to the caption.

[2] Public Notice was given on April 15, 1988 Report No. 1724 (RM-6333 and RM-6334).

[3] The coordinates for Channel 287C2 at Poplar Bluff are 36-49-50 and 90-18-54.

[4] The coordinates for Channel 298A at Campbell are 36-32-45 and 90-01-35.

[5] The coordinates for Channel 280A at Ellington are 37-14-24 and 90-58-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-419

In the Matter of

Amendment of Section 73.202(b), RM-5800
Table of Allotments,
FM Broadcast Stations.
(Burlington, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1988; Released: November 30, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6261 (1987), proposing the allotment of FM Channel 237A to Burlington, Kansas, as that community's first FM service. The *Notice* was issued in response to a petition filed by Douglas R. Lawrence (petitioner). Petitioner filed supporting comments reaffirming its intention to apply for the channel. Eagle Christian, Inc. also filed supporting comments. No other comments were received.

2. We believe the public interest would be served by the allotment of FM Channel 237A to Burlington, Kansas, since it could provide that community with its first FM broadcast service. The *Notice* was conditioned on the grant of a license for Station KHUM(FM), Channel 239C1, Ottawa, Kansas, to relocate its transmitter site in accordance with a construction permit issued by the Commission. The license for Station KHUM(FM) was granted on June 21, 1988 (BLH 870511KA). The allotment of Channel 237A at Burlington can now be made in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 6.0 kilometers (3.7 miles) east of the community.[1] The site restriction will prevent a conflict with Station KICT-FM, Channel 235C, Wichita, Kansas, and Station KHUM(FM), Channel 239C1, Ottawa, Kansas.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 17, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Burlington, Kansas	237A

4. The window period for filing applications will open on **January 18, 1989** and close on **February 17, 1989**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237A at Burlington are 38-11-02 and 95-40-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-72

In the Matter of

Amendment of Section 73.202(b),	RM-5073
Table of Allotments,	RM-5240
FM Broadcast Stations.	RM-5404
(Columbia, Greenwood,	RM-5405
Hartsville, Lexington and	RM-5406
North Augusta, South Carolina)	

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1988; Released: August 11, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration, filed by the South Carolina Educational Television Commission (SCETV), of the *Report and Order*, 2 FCC Rcd 2176 (1987), in which the Commission, inter *alia*, made separate allotments of channel 253A to Hartsville and Lexington, South Carolina, substituted channel 248C1 for channel 250 at Columbia, South Carolina, modified the license of station WCOS-FM, Columbia, South Carolina, accordingly, and denied SCETV's proposal to allot channel 248C2 to Greenwood, South Carolina, as a channel reserved for noncommercial educational use. WCOS, Inc. (WCOS), licensee of Stations WCOS and WCOS-FM, and Sky Broadcasting of Charlotte, Inc. (Sky), licensee of Station WPEG(FM) at Concord, North Carolina, each filed oppositions to the petition for reconsideration. SCETV filed a reply.[1]

2. In the *Report and Order*, the Commission considered three allotment options. The first option, which was ultimately adopted, allotted channel 253A as a first local fulltime service to Lexington, separately alloted channel 253A as a first FM service to Hartsville, and enabled station WCOS to downgrade its operations to channel 248C1, thereby eliminating short spacings to three stations, including a 147 kilometer (89 mile) short spacing to station WPEG, Concord, North Carolina. The second option would have foreclosed SCETV's proposal, and SCETV's petition for reconsideration takes no exception with the Commission's rejection of that option. The third option, proposed by SCETV, would have allotted channel 248C2 to Greenwood, South Carolina, and first fulltime FM services to Lexington and Hartsville. Because of short spacing between channel 248C2 at Greenwood and channel 248C1 at Columbia, the first and third options were mutually exclusive.

3. In rejecting the third option, the Commission noted that both the first and the third options would allot a first FM service to both Hartsville and Lexington. However, the Commission noted that SCETV's proposal was contingent on station WCOS-FM operating as a class C1 facility on Channel 250 at its present transmitter site, or retaining its present class, relocating its transmitter site 21.5 kilometers north of its present location and operating on channel 253C. The Commission determined that, because WCOS had only indicated its willingness to downgrade facilities if existing short spacings were thereby eliminated, modification of station WCOS' license to channel 250C1 in order to accommodate SCETV's request would constitute an involuntary downgrade of WCOS' license. The Commission determined that SCETV had not made the unusually strong and compelling showing of public interest benefit required in order to justify the forced relocation of WCOS-FM's transmitter site. The Commission also noted that SCETV had not stated its willingness to reimburse WCOS for the cost of any forced change in its facilities. Finally, the Commission found that the public interest benefits from the allotment of channel 248C2 to Greenwood were offset by the public interest benefits accruing as a result of the elimination of short spacing for WCOS-FM.

4. In its petition for reconsideration, SCETV first takes issue with the Commission's determination that its proposal would require a forced downgrade or transmitter site move for WCOS-FM. SCETV notes that, in its counterproposal in this proceeding, it supplied hypothetical site coordinates for the allotment of channel 248C2 at Greenwood which would meet the Commission's minimum distance separation requirements to the present WCOS-FM. SCETV states that the Commission apparently relied in its determination on a different set of coordinates, subsequently supplied in reply comments by SCETV, and that those coordinates were supplied in order to accommodate other proposals in the proceeding. SCETV also argues that the Commission unfairly characterized its proposal to downgrade WCOS-FM on channel 250 as a forced downgrade, because WCOS was seeking to downgrade on channel 248, and because, even though a downgrade on channel 250 would not completely resolve all short spacings encountered by WCOS on channel 250, it would reduce them considerably. SCETV argues that a downgrade is not a draconian penalty which requires rejection of the obvious public interest benefits of its proposal.

5. SCETV also alleges that the Commission departed from its current allotment priorities by considering the elimination of short spacing as a comparative public interest factor, and by failing to apply the numerical weighting system utilized by the Commission in MM Docket 84-231. SCETV argues that the Commission eliminated consideration in allotment proceedings of the public interest benefits flowing from the elimination of short spacing when, in 1982, it eliminated the FM allocation priority first adopted in the *Third Report and Order* in Docket 14185, 47 FCC 747 (1963), designed to provide all existing stations with channels which complied with the then newly adopted spacing requirements. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). SCETV states that the Commission's current thinking is best set forth in the *First Report and Order* in MM Docket No. 84-231, 100 FCC 2d 1332 (1985), in which the Commission adopted a point system for FM allotments. Applying that system, SCETV argues that its proposal should be preferred.

6. Finally, SCETV argues that the Commission failed to credit properly the public interest benefits of SCETV's proposal. SCETV states that it is an agency of the State of South Carolina, and must discharge a statutory mandate to bring public television and radio service to all of the citizens of the state. SCETV states that it demonstrated in

its counterproposal that no noncommercial educational station can be authorized in the noncommercial band at Greenwood due to the proximity of a TV Channel 6 station. SCETV states that its proposal would bring noncommercial service to 128,100 people, and first public radio service to 110,718 people. Finally, SCETV states that its proposal constitutes the only opportunity to complete its statewide network, and that it believes the expenditure of scarce public resources to seek and construct class A facilities which would serve Greenwood and the surrounding area is unjustified.

7. In its opposition, WCOS first addresses SCETV's claim that its proposal could be adopted without any change to WCOS-FM's existing facilities. WCOS notes that, while the bulk of SCETV's pleadings were directed to the proposed downgrading or relocation of WCOS-FM on channel 250, one of the two sets of reference coordinates for channel 248C2 at Greenwood supplied by SCETV did meet the minimum spacing requirements to WCOS' existing facilities. However, WCOS points out that, if WCOS-FM maintains its present facilities, channel 253A cannot be allotted as a first FM service to Hartsville, because a station operating from a site complying with the Commission's minimum distance separation requirements to WCOS-FM could not provide city grade service to all of Hartsville. WCOS argues that the Commission is essentially faced with a trade off between the allotment of channel 248C2 to Greenwood or the allotment of channel 248C1 to Columbia and channel 253A to Hartsville.

8. In making its decision, WCOS argues, the Commission properly applied the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91-93 (1982). WCOS notes that the Commission has held that the numerical weighting factors employed in Docket 84-231 did not supplant the Commission's normal allotment priorities, but were instead limited in applicability to the special task faced in Docket 84-231. Applying our normal priorities, WCOS argues that the Commission's decision provides for a first local service at Hartsville, and that elimination of short spacings is a valid public interest factor to consider under the Commission's allotment priorities. Both WCOS and Sky argue that, by simplifying in 1982 the Commission's allotment priorities, the Commission did not intend to abandon its long-standing allotment goal of providing fully spaced channels for all existing allotments.

9. WCOS also takes issue with SCETV's claim that 110,718 persons would receive a first public radio service from a reserved allotment of channel 248C2 to Greenwood. WCOS submitted a study showing that 99,103 would receive first noncommercial radio service. WCOS also noted that a proposed class A allotment to Greenwood in MM Docket 86-487 could provide first noncommercial service to 66,260 persons in the same area.[2]

10. In its reply, SCETV reiterates its argument that the *Revision of FM Assignment Policies* eliminated the allotment priority for elimination of short spacings. SCETV notes that, by implication, the Commission's decision was premised on the minimal public interest benefits accruing from minor service gains made possible by the elimination of minor short spacings, especially as compared to the public interest benefits accruing from new service proposals. SCETV argues that the record in this proceeding establishes that approximately 12,000 people would receive new interference free service if WCOS-FM were to downgrade to channel 248C1, and that a station at Hartsville would serve approximately 11,165 persons. SCETV argues that, even assuming that only 99,103 persons would receive service from a station operating on channel 248C2 at Greenwood, the Greenwood allotment should be preferred to the downgrading of WCOS-FM and the allotment to Hartsville, because only 23,000 persons would receive new service as a result. Although SCETV also rejects the option of applying for a class A channel because it could not afford to compete with numerous commercial applicants for such a channel, it notes that, even subtracting the 66,260 persons that could be served by a class A facility, its proposals would still be preferrable.

11. In their joint response, WCOS and Sky take issue with SCETV's population calculations. They first note that one of the two applications filed for the Hartsville allotment indicates a population served of 63,260, and the other 94,659. In addition, WCOS and Sky submit engineering studies showing that, if WCOS and Sky were no longer required to suppress radiation toward each other due to short spacing, WPEG could modify its facilities and serve approximately 85,000 additional persons, and WCOS-FM could modify its facilities and serve approximately 107,000 additional persons. Both WCOS and Sky stated their intention to seek such modifications.

12. On August 6, 1987, the Commission granted a construction permit to Erskine College for a new noncommercial educational FM station at Due West, South Carolina. We will grant the request by WCOS for official notice of that action. A contour map submitted with WCOS' Opposition to Petition for Reconsideration indicates that the new station will provide service to a substantial area that would be served by a class C2 allotment to Greenwood, including the community of Greenwood. In comments on WCOS' request for official notice, SCETV argues that Erskine College does not intend to provide traditional public radio service by seeking National Public Radio affiliation, and submits a letter from an official at Erskine College attesting to that fact.

DISCUSSION

13. After full consideration of the pleadings in this case, we deny SCETV's petition for reconsideration. Although we continue to believe that adoption of SCETV's proposal would offer public interest benefits, we also continue to believe the proposal adopted in the*Report and Order* in this proceeding is preferrable comparatively. In reaching our decision, we apply the criteria set forth in *Revision of FM Assignment Policies*, [3] as we have done consistently in all cases where the unique circumstances presented in Docket 84-231 are not present. Each of the conflicting proposals analyzed in the *Report and Order* is considered in the context of the Commission's fourth allotment priority – other public interest matters.

14. We reject SCETV's contention that consideration under our fourth allotment priority of the elimination of short spacing between station WCOS-FM and three other stations contravened the Commission's 1982 revision of the FM allotment priorities. Although that revision deleted what until that time had been the Commission's first allotment priority -- provision of fully spaced allotments for all stations existing at the time of the adoption of the FM Table of Allotments – the Commission's action was expressly premised on the fact that provision for all existing stations had long since been made.[4] The factual predicate for the Commission's action is absent in this case.

Moreover, the 1982 revisions were not premised on a finding that the elimination of short spacing provides no public interest benefits whatsoever. Indeed, the Commission's fourth priority was intended to allow comparison of numerous factors, and was not limited to any set list of relevant bases of comparison.[5] Therefore, we may, at a minimum, consider the elimination of existing short spacings under priority four.

15. The public interest benefits from the elimination of short spacing are particularly compelling in this case. WCOS-FM is short spaced by more than 100 kilometers to authorized facilities for station WPEG, a distance more than one third of the normally required separation under our rules. Although SCETV argues that record evidence establishes that the downgrading of WCOS to channel 248C1 would only result in new interference free service to approximately 12,000 persons, that figure only includes gains from the elimination of existing areas of destructive interference, and does not include potential service gains made possible by the elimination of short spacing to WCOS-FM. Those service gains are substantial. WPEG will be able to increase its population served by 85,000 persons. WCOS, after downgrading its class, will be able to serve approximately 107,000 additional persons.

16. We also affirm our determination that SCETV's proposal to downgrade WCOS-FM on channel 250 is a less desirable alternative. Although SCETV notes that WCOS itself sought to downgrade its station, it only sought to do so if all existing short spacings would be eliminated. We will not construe a licensee's express willingness to downgrade on one channel as a blanket expression of interest in downgrading on any other channel, if there are material differences between the two channels. Moreover, SCETV has not shown that the public interest benefits from the allotment of channel 248C2 to Greenwood are sufficiently compelling to warrant the forced downgrade of WCOS-FM, especially in light of the available alternative means for achieving the valid public interest goals of WCOS and SCETV. First, even if WCOS-FM were to downgrade on channel 250, it would still remain significantly short spaced to the authorized facilities for station WPEG. Second, SCETV could have applied for authority to construct a class A facility on channel 278A at Greenwood. Although SCETV asserts that it cannot justify the expenditure of scarce public resources in order to seek a mere class A facility, SCETV provides no factual support for that assertion whatsoever.[6]

17. Although SCETV correctly notes that channel 248C2 can be allotted to Greenwood if WCOS-FM's present allotment remains unchanged, the public interest benefits accruing from its proposed allotment scheme would be gained at the cost of both the elimination of WCOS-FM's short spacings and the allotment of a new service to Hartsville serving approximately 60,000 persons. Moreover, the public interest benefits of SCETV's proposal have since been lessened considerably by the authorization of additional noncommercial service at Due West, South Carolina. The fact that Erskine College, the permittee of the new station, does not intend to affiliate with National Public Radio is irrelevant. Even if we were to allot channel 248C2 to Greenwood and reserve it for noncommercial use, there is no guarantee that the successful applicant for the channel will provide such traditional public radio service. Accordingly, we do not believe it is appropriate to consider as a relevant factor the specific type of noncommercial programming provided by Erskine College. In light of the compelling benefits accruing from the proposal adopted, we believe rejection of SCETV's proposal best served the public interest.

18. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by the South Carolina Educational Television Commission IS DENIED.

19. For further information concerning this proceeding, contact Karl A. Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In addition, the parties filed several pleadings outside the normal pleading cycle. WCOS and Sky filed a Joint Motion for Leave to Respond and Response. WCOS also filed a Motion for Leave to Submit Supplement and Supplement, and a Request for Official Notice. SCETV filed a motion to strike the Response, to which WCOS and Sky responded, and comments on the Request for Official Notice. We will grant the Joint Motion for Leave to Respond and consider the Response. The Response addresses arguments based upon facts in the record first raised by SCETV in its reply to the oppositions of WCOS and Sky to the Petition for Reconsideration. Because those arguments could have been raised when the Petition for Reconsideration was filed, we believe it appropriate to afford WCOS and Sky a full opportunity to respond. Moreover, consideration of the response will ensure a full and accurate record of the facts relevant to the points raised by SCETV, and would therefore serve the public interest. We will deny the Motion for Leave to Submit Supplement filed by WCOS, because WCOS supplied no justification for the late filing of the information submitted. We also take official notice of the grant of a construction permit to Erskine College for a class C2 noncommercial educational FM station at Due West, South Carolina. *See* File No. BPED-851231MZ. That station will provide noncommercial educational service to a significant portion of the area SCETV claims would receive first noncommercial service if its proposal were adopted.

[2] That proposal was subsequently adopted by allotting Channel 278A to Greenwood. *See Greenwood and Abbeville, South Carolina*, 2 FCC Rcd 5189 (1987).

[3] Those criteria, in order of priority, are:

1) First full-time aural service.

2) Second full-time aural service.

3) First local service.

4) Other public interest matters.

Priorities 2 and 3 are given coequal weight. 90 FCC 2d at 91. Among the matters relevant to priority four is the need for or lack of public radio service. 90 FCC 2d at 92, n.8.

[4] 90 FCC 2d 88, 92 (1982).

[5] 90 FCC 2d at 92, ¶ 12 and n.8. Although a number of specific factors were listed that might be relevant to decisions under priority four, the Commission permitted consideration of "other matters."

[6] We recognize that a class A facility may reach a smaller population than a higher class facility. However, we also note that lower class facilities are generally less expensive to both construct and operate. We also recognize that the cost of competing for a license in a comparative hearing may prove significant. However, even if we were to allot channel 248C2 to Greenwood and reserve it for noncommercial use, SCETV would be required to compete with any other eligible applicant for the allotment. In addition, we have exempted noncommercial applicants from our fee requirements, thereby removing a significant cost barrier to competition by noncommercial applicants for non reserved frequencies. *See* 47 CFR § 1.1113.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-2

In the Matter of
Amendment and Clarification of Part 69
Rules Governing the National Exchange
Carrier Association

REPORT AND ORDER

Adopted: November 7, 1988; Released: November 18, 1988

By the Commission:

I. INTRODUCTION

1. In January 1987, we issued *Memorandum Opinion and Order and Notice of Proposed Rulemaking (Notice)* proposed to amend Section 69.603 of our rules[1] governing the recovery of the expenses of the National Exchange Carrier Association (NECA) to produce a result that would more accurately reflect NECA's various present and future activities.[2] The *Notice* tentatively concluded that certain rule changes will be necessary to ensure the continuation of reasonable, nondiscriminatory rates for interstate services. We noted that under our current rules all of NECA's expenses, including expenses related to the preparation of all NECA tariffs and the administration of the traffic-sensitive (TS) pool, are being recovered from the common line elements. We also observed that we had authorized NECA to engage in certain activities other than the administration of interstate access charges. thus, we concluded that our rules should be revised to provide a more precise apportionment of NECA's expenses associated with its various activities.

2. The *Notice* proposed that NECA divide its expenses into two categories. Under our proposal, Category I would include those expenses associated with the preparation, defense, and modification of NECA tariffs, the administration of pooled receipts and distributions of exchange carrier revenues resulting from NECA tariffs, and NECA's participation in Commission proceedings involving Subpart G of Part 69 of the Commission's Rules.[3] We then proposed subdividing Category I expenses into common line expenses and other expenses.[4] Category II would consist of all other NECA expenses. In reaching this determination, we tentatively concluded that the cost of NECA participation in proceedings other than investigations or pre-investigation review of NECA tariffs, court proceedings related thereto, or matters that relate to Subpart G of Part 69 of the Commission's Rules should be assigned to a non-access category. We proposed these changes in order to produce fairer apportionment of NECA's expenses that more accurately reflects NECA's activities. We also proposed to require the inclusion of data and information on NECA's historical and projected expenses in its tariff filings so that interested parties would be in a better position to comment on NECA's expenditures during the review of its tariff filings. Ten parties filed comments in response to the *Notice*.[5] NECA and NTCA filed reply comments.

3. Following the filing of the initial round of comments, we adopted recommendations of the Federal-State Joint Board in CC Docket Nos. 80-286 and 78-72 that significantly affect NECA's responsibilities in the administration of access charges as of April 1, 1989.[6] On that date, exchange carriers will be free to leave the common line pool on a voluntary basis, subject to certain support requirements.[7] To implement this revised pooling arrangement, NECA is required to collect data from pooling and non-pooling carriers to calculate a theoretical nationwide CCL rate. Beginning in April 1989, NECA will calculate, bill, and distribute carriers, Transitional Support and Long Term Support payments. Moreover, as part of the revisions of the pooling arrangements, NECA will, after April 1, 1989, have the additional responsibilities of calculating the Lifeline Assistance and Universal Service Fund revenue requirements, and billing those amounts directly to interexchange carriers (IXCs).[8] In addition to these new duties, we recently directed NECA to develop a "common terms and conditions" tariff for use by small exchange carriers that decide not to participate in the NECA TS pool.[9]

4. On March 17, 1988, NECA filed supplemental comments [10] which propose an alternative apportionment approach to reflect NECA's altered responsibilities after April 1, 1989. NECA proposes expanding the Category I expenses to include those expenses that are associated with Association functions pursuant to subsections 69.603(c)-(g).[11] NECA's plan would apportion NECA's Category I expenses among three components in proportion to the revenues associated with each component. The first component would be in proportion to the revenues associated with the Universal Service Fund and Lifeline Assistance programs. The second component would be in proportion to the revenues associated with NECA common line tariffs, Long Term Support, and Transitional Support. The third component would be in proportion to the revenues associated with all other NECA pool tariffs, including its "Common Terms and Conditions" tariff. NECA supports use of a revenues allocation method for apportioning its Category I expenses, stating that it would achieve an equitable distribution of expenses without introducing additional administrative expenses.[12] NECA's plan would not alter the treatment of Category II expenses proposed in the *Notice*. Finally, NECA proposes that the specification of the Category I expense cost support data it would be required to file be modified slightly. We invited interested persons to comment on the NECA supplemental proposal.[13] Four parties filed comments.[14] NECA and SW Bell filed reply comments.

5. In this *Order*, we adopt certain amendments to Section 69.603 of our rules that establish revised apportionment procedures for NECA's expenses that reflect its duties in the revised access environment. We also adopt rules concerning NECA's duty to file data relating to NECA administrative costs with its tariff filings.

II. SUMMARY OF COMMENTS

6. The majority of the comments and reply comments in response to our *Notice* generally support the adoption of rules that specify the apportionment of NECA's expenses between expenses related to interstate access charges and

all other activities, and agree that the former type of expenses should be further apportioned among the activities included in that category in order to apportion NECA's expenses to those benefiting from an activity.[15] Several parties suggest that the timing of the effectiveness of any rule changes should be coordinated with other pending Commission proceedings, noting especially that issues relating to subscriber line charges, the Universal Service Fund, Lifeline Assistance, and mandatory common line pooling were under consideration at that time.[16] Those parties observe that resolution of those issues could introduce additional issues relating to NECA's recovery of its administrative expenses. NECA and NTCA's reply comments observe that the Joint Board proceeding relating to subscriber line charges and other issues has just been finalized. Each argues that any rules should not be made effective prior to April 1,1989, the date on which most of the changes to the access charge rules become effective.

7. Parties also raised some specific concerns in the first round of pleadings. Bell Atlantic argues that its First Amendment rights are harmed when it is forced to participate in an organization that professes ideas Bell Atlantic opposes. Therefore, it asserts that the proposed rule should be modified to limit the expenses included in Category I.A, which are to be funded by all of NECA's members, and to include only the defense of NECA's common line tariff filings, with all other Part 69-related activities included in Category II expenses in which interested members fund NECA's participation on an individual-case basis. Bell Atlantic states that the current Category I.A definition could permit inclusion of costs associated with NECA oppositions to petitions filed by NECA members seeking reform of the mandatory pooling mechanism or the establishment of alternative rate structures for the recovery of non-traffic-sensitive (NTS) costs. Bell Atlantic also believes that, when expenses associated with a filing are included in Category I, NECA should identify when some of its members do not agree with a position it takes when making a filing. NTCA, in its reply comments, opposes the Bell Atlantic position, stating that Bell Atlantic's view was expressly rejected in the *Notice* . Contel states that while NECA should have an unrestrained voice in any relevant FCC proceeding, the costs of NECA participation should be borne only by those companies soliciting NECA's view on a particular matter. Contel believes the proposed rules will accomplish this purpose.

8. ALLTEL suggests that NECA be required to create a separate category under Category I expenses for the expenses of administering the TS pool and that these costs should continue to be part of the revenue requirement for NECA tariffs filed pursuant to Sections 69.4(a) and (b)(2). ALLTEL argues for this form of recovery so that the expenses can be recovered from as broad a base as possible since, in its view, nationwide pooling benefits all carriers and their ratepayers. CP National observes that if NECA's expenses are associated with access charges, they should be recovered from as broad a base as possible since they contribute to this Commission's public interest determinations pursuant to its mandate in the Communications Act to ensure nationwide service at reasonable rates. CP National supports a revenue-based apportionment system to disaggregate NECA's access expenses among various rate elements, suggesting that such a system would be easy to administer, and recognizes that each regulated element should share equitably in the recovery of NECA's expenses.

9. Ameritech states that, while it would be preferable from an economic standpoint to use incremental costs for allocating the costs of NECA's administration of the voluntary billing and collection pool, the fully distributed cost approach of the Joint Cost proceeding[17] should be used to allocate NECA's unregulated activities for consistency's sake. NTCA states that the development of specific accounting and cost allocation mechanisms should be left to NECA since it is in the best position to analyze its expenses and determine the best cost allocation scheme. Bell Atlantic suggests that NECA be required in its annual filings to describe the method used to allocate its expenses among the categories and subcategories.

10. The comments on the proposal to include data and information on NECA's administrative costs in its tariff filings generally support such a rule. NECA, however, questions whether the data filing requirements proposed in the *Notice* are consistent with the cost support requirements of Section 61.38 of our rules.[18] It suggests that filing data on its expenses consistent with its past year cost-of-service study and its prospective forecast of its expenses for the tariff period would achieve such consistency and would be of most value to this Commission and interested persons.

11. The parties commenting on NECA's Supplemental Comments urge this Commission to adopt the NECA proposal for apportioning its Category I expenses among the three subcategories. SW Bell and OPASTCO state that the NECA proposal is consistent with the basic methodology suggested in the *Notice*. NTCA, OPASTCO, and Century note that the use of revenues to allocate the Category I expenses will minimize NECA's administrative expenses, while resulting in an equitable apportionment to the parties that benefit from NECA's activities. OPASTCO and Century observe that data on the expected revenues will be available from the data supporting NECA's tariffs, and the apportionment will thus be done on a basis consistent with the ratemaking treatment of the expenses.

12. SW Bell's support for the NECA proposal was conditioned in its supplemental comments on including only the revenues received from pooling carriers in the calculations disaggregating NECA expenses in Category I. In reply to SW Bell's conditional support, NECA states that the second component, which includes the common line pool activity, would be calculated based on revenues associated with NECA's common line tariff participants, as well as Transitional Support and Long Term Support funds. NECA also clarified that its calculations would be updated yearly. In its reply comments, SW Bell withdrew the condition on its support, recommending that we adopt the NECA proposal to disaggregate expenses so that the expenses are more closely recovered from the beneficiaries of the activities that generated the expenses.

III. DISCUSSION

13. The *Notice* proposed amending Section 69.603 to specify the apportionment of NECA expenses among its various activities in order to achieve a better correlation between the persons who pay those expenses and the persons who benefit from the activities. As discussed above, we proposed that NECA's expenses first be appor-

tioned into two categories--expenses related to NECA's administration of interstate access charges and all other expenses, with the former category being apportioned between activities associated with the common line pool and all other NECA activities included in that category. As proposed, Category I would include expenses associated with the preparation, defense, and modification of NECA tariffs, the administration of pooled receipts and distributions of exchange carrier revenues resulting from NECA tariffs, and participation in Commission proceedings involving Subpart G of Part 69 of our rules. No party commenting on the apportionment of expenses between Categories I and II has questioned the need for such a division. In fact, as they observe, without such an apportionment, it is not possible for us to ensure that NECA does not cross-subsidize its Category II activities with revenues from interstate access charges. NECA's supplemental proposal would modify the description of Category I expenses by adding language that would make it clear that those expenses associated with its Section 69.603(c)-(g) activities are included in Category I expenses. The functions that NECA is required to perform pursuant to Section 69.603(c)-(g) are essential to the functioning of interstate access charges in the new environment. Thus, it is appropriate that the expenses associated with these activities be included in Category I expenses. Accordingly, we adopt our proposed apportionment of NECA expenses between Category I and Category II, as modified by the inclusion of the language proposed by NECA.

14. Bell Atlantic proposes to exclude from Category I any common line expenses other than those associated with the defense of NECA's carrier common line tariff filings, and include them instead in Category II. We find this definition of Category I to be too narrow. It could severely limit NECA's legitimate ability to participate in proceedings before this Commission that affect NECA's functions, thereby restricting our ability to be fully informed on issues related to important aspects of the administration of interstate access charges and of NECA itself. Moreover, as NTCA notes in its reply comments, we rejected this type of approach in the *Notice*.[19] The rule proposed in the *Notice*, with NECA's modification, in our view reflects the proper delineation of what should be included within Category expenses. The Category I expenses that Bell Atlantic wishes to exclude relate to functions that NECA is mandated by this Commission to perform and to NECA's participation in Commission proceedings related to those functions. Since this Commission has determined that NECA is required to perform these functions to assist in the achievement of our access charge objectives, it is appropriate that the associated expenses and NECA's costs of participating in Commission proceedings relating to those functions be deemed to benefit ratepayers generally, and that NECA be assured of its ability to recover such expenses. Therefore, it is appropriate that these expenses be recovered by incorporating them in the revenue requirement for Category I, which assures NECA's recovery of its expenses, as well as providing for their recovery from a broad spectrum of ratepayers. As we noted in the *Notice*, in rejecting a similar First Amendment argument:

> We also do not find that our rules result in the mandatory funding by exchange carriers of views with which they might disagree because our rules provide that interstate exchange access customers, rather than exchange carriers, are assessed and must pay the expenses that are associated with NECA's operations. . . . Any entity, including any NECA member, who disagrees with the form, content, or substance of NECA's comments is, of course, also free to express its views in these proceedings.[20]

Bell Atlantic has not presented any new arguments to support its position. Therefore, we reject Bell Atlantic's request that we change our proposed definition of the Category I expenses.

15. Bell Atlantic also believes that NECA pleadings should disclose that some of its members do not agree with a position it takes when making a Category I filing. If every member had to be polled before comments could be filed, NECA's administrative burden would be substantially increased in a manner that could impede NECA's voluntary participation in some proceedings or increase the difficulty of making timely filings. This would be an undesirable result. We will not require that NECA follow such a procedure.

16. In the normal course, the adoption of a rule requiring the apportionment of expenses between Category I and II would require implementing arrangements. However, in the instant case, the Common Carrier Bureau has conditionally approved a cost manual containing the procedures NECA will use to apportion its expenses between Categories I and II.[21] The apportionment procedures of that manual are based on fully-distributed cost principles, thus satisfying Ameritech's concerns with the consistency of NECA's manual with the rules we adopted in the Joint Cost proceeding.

17. Category I expenses also must be apportioned among the various activities NECA performs under that rubric. The proposal in the *Notice* would have apportioned these expenses between two subcategories--one for common line expenses and the other for all other expenses. However, with the changes to the interstate access charge pooling arrangements and NECA's responsibilities in this revised structure, we believe that NECA's proposal for three subcategories is more consistent with NECA's new duties than our original proposal. NECA's proposal essentially retains our proposal, but divides our proposed common line subcategory into two parts--one for expenses relating to NECA's administration of our Universal Service Fund and Lifeline Assistance programs and the other for the costs of administering NECA's common line pool and the common line support flows. NECA also proposed rules that specified that the tariff charges reflecting the various pools would not include any administrative expenses other than those associated with the respective pool, and that no distribution from any revenue pool should include any adjustment for administrative expenses other than those related to the respective revenue pool. *See* 69.603(i)(1)-(6) in Appendix A.

18. By its approach, NECA proposes to add the administrative costs of the Universal Service Fund and Lifeline Assistance programs to the bills that it will send directly to the interexchange carriers. NECA proposes to recover the administrative expenses assigned to Category I.B through individual company or NECA common line revenue requirements, as appropriate.[22] Thus, the apportioned administrative expenses will be recovered as part of the revenue requirement for the activities associated with each subcategory. This result is consistent with our goal to

better tailor the apportionment of NECA's expenses to the activities for which they are incurred. No party commenting on this issue has questioned the desirability of specifying the apportionment procedures that NECA should utilize in subdividing its Category I expenses into the three categories proposed by NECA. Moreover, there is general agreement among the commenting parties that disaggregation of expenses based on the proportion of revenues from each category is an administratively simple approach that will result in fair apportionments without imposing significant additional administrative expenses on NECA.[23] Therefore, we adopt the apportionment of Category I expenses proposed in NECA's Supplemental Comments.[24] Sections 69.603(h) and 69.603(i)(1)-(6), as set forth in Appendix A of this Order, shall become effective on April 1, 1989, coincident with the date on which the revised rules impacting NECA's responsibilities become effective.

19. ALLTEL suggests that NECA be required to create a separate category under Category I expenses for the expenses of administering the TS pool and that these costs should continue to be part of the revenue requirement for Association tariffs filed pursuant to sections 69.4(a) and (b)(2) (the CCL rate element). It argues that in this manner the expenses can be recovered from as broad a base as possible. In its view, this is proper because nationwide pooling of TS costs benefits all carriers and their ratepayers. We decline to adopt this suggestion because it is inconsistent with our goal that these costs be apportioned in a manner that associates the costs with the beneficiaries of the expense. Here, the clear beneficiaries of the expense are those carriers that use NECA to prepare, file, and administer their TS tariffs and the ratepayers who receive services from those carriers. The consolidation of these functions produces economies for each of the participating carriers, and thus NECA's expenses associated with those activities should be part of the revenue requirement for the TS pool, not the common line pool.

20. We also proposed to require NECA to file certain data and information relating to its administrative expenses with its tariff filings. The *Notice* proposed requiring NECA to include in its cost support materials for each tariff filing data and information relating to NECA expenses associated with its administration of interstate access charges for the twelve months immediately preceding the tariff filing and, as forecasted, for the twelve calendar months subsequent to the month preceding the month in which the tariff filing is made. We proposed this requirement to permit this Commission to review NECA's expenses and to enable interested persons to comment on NECA's administrative expenses. NECA proposes, as an alternative to our proposal, that the cost support data on its Category I expenses that are to be filed with its tariffs should reflect a twelve-month period consistent with its past year cost-of-service study and should provide a forecast for the twelve calendar months commencing with the month the tariff rates are scheduled to become effective. This change, it is submitted, will bring the data filing requirement in line with NECA's other Section 61.38[25] tariff cost support requirements. After considering the two options, we conclude that the rules should not specify time periods for NECA administrative expense data. Rather, it will be sufficient for our purposes if NECA includes in its annual tariff filings the appropriate cost support materials on its administrative expenses. In the absence of contrary instructions, administrative expense data should be consistent with other cost support data that is filed with a particular access tariff filing. This procedure will permit the coordination of all data to be filed so that it will be of the most use to this Commission and interested parties, and not unduly burdensome on NECA. Accordingly, we adopt a requirement that NECA file certain data on its administrative expenses with its annual tariff filings, as set forth in Section 603(i)(7) in Appendix A. This section shall be effective for tariffs filed to become effective on or after April 1, 1989.

IV. CERTIFICATIONS AND ORDERING CLAUSES

21. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labelling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

22. It is certified that the requirements that are contained in the Regulatory Flexibility Act,[26] are not applicable to the rules adopted in this proceeding.[27]

23. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i)-(j), 201-202, 205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 201-202, 205, and 403, that Part 69 of the Commission's Rules IS AMENDED as set forth in Appendix A. Sections 69.603(h)-(i)(6) shall become effective on April 1, 1989. Section 69.603(i)(7) shall be effective for any tariff containing an effective date of April 1, 1989, or later.

24. IT IS FURTHER ORDERED, that the motion filed by the National Exchange Carrier Association to accept its Supplemental Comments IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. § 69.603.

[2] 2 FCC Rcd 381 (1987). The *Notice* was issued in partial response to a petition of six state public utility regulatory bodies that requested us to (1) clarify the extent to which NECA is permitted to participate in FCC proceedings, (2) investigate the expenditures of NECA and the accountability and control of its budget process, (3) initiate an inquiry into NECA's future role, including whether it should continue in existence, and (4) initiate an inquiry into the staffing of NECA. We resolved most of the issues in the *Notice*, but requested comment on a few specific proposals, which are the subject of this order.

[3] Subpart G establishes NECA as an organization and describes its purpose and functions in the implementation of interstate access charges. 47 C.F.R. §§ 69.601- 612.

[4] *See Notice* at App. A. The voluntary TS pool includes a smaller group of carriers than the mandatory common line pool.

[5] NECA, ALLTEL Corporation (ALLTEL), the Ameritech Operating Companies (Ameritech), BellSouth Corporation and the BellSouth Telephone Companies, the Bell Atlantic Telephone

Companies (Bell Atlantic), Contel Corporation (Contel), CP National Corporation (CP National), GTE Service Corporation and its affiliated domestic telephone operating companies, NYNEX Telephone Companies (NYNEX),Pacific Bell and Nevada Bell, Southwestern Bell Telephone Company (SW Bell), the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, and the National Telephone Cooperative Association (NTCA) filed comments.

[6] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,2 FCC Rcd 2953 (1987), *aff'd on recon.*, 3 FCC Rcd 4543 (1988), *appeal pending sub nom.* Public Service Commission of the District of Columbia v. FCC, No. 88-1661 (D.C. Cir. filed Sept. 12, 1988).

[7] *See* 47 C.F.R. § 69.612. Exchange carriers leaving the pool will be obligated to make payments to the common line pool to keep the pooled Carrier Common Line (CCL) rates at the nationwide average level that would have resulted if all exchange carriers had remained in the pool. Thus, exchange carriers that withdraw from the NECA pool are required to contribute Long Term Support to exchange carriers that remain in the NECA pool, so as to enable pooling companies, which generally will be smaller, higher cost companies, to tariff a CCL charge equal to the charge that would have resulted if all exchange carriers had remained in the pool. In addition, four years of Transitional Support payments will be provided to qualifying exchange carriers that withdraw from the pool. Transitional Support will be paid by those non-pooling companies that were net contributors to the pool in 1988.

[8] 47 C.F.R. §§ 69.603(c) and 69.603(d).

[9] Regulation of Small Telephone Companies, 2 FCC Rcd 3811 (1987). 11

[10] The supplemental comments were accompanied by a motion requesting their acceptance in light of changed circumstances relating to NECA's ongoing functions. The circumstances cited in the motion clearly raise additional factors to be considered in reaching a decision on the proper expense apportionment. Moreover, we sought public comment on the supplemental filing by Public Notice dated April 16, 1988, DA 88-435, and a number of parties did file comments. *See infra* note 14. Thus, no party should be harmed by our consideration of this filing. Accordingly, NECA's motion is granted.

[11] Section 69.603(c)-(g) specifies duties assigned to NECA relating to the Universal Service Fund, Lifeline Assistance, Long Term Support, Transitional Support, and the development of a "Common Terms and Conditions" tariff for small telephone companies.

[12] NECA Supplemental Comments at 6.

[13] *See supra* note 10.

[14] NTCA, SW Bell, Century Telephone Enterprises, Inc. (Century), and the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) filed comments in response to the NECA Supplemental Comments.

[15] *See e.g.*, Ameritech Comments at 2; NYNEX Comments at 2.

[16] As indicated in paragraph 3, *supra*, these issues were resolved after the comment round, but prior to the reply round.

[17] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298, *recon. in part*, 2 FCC Rcd 6283 (1987).

[18] 47 C.F.R. § 61.38. Our *Notice* proposed that NECA include in its cost support materials with each tariff filing data and information on its expenses associated with its administration of interstate access charges for the twelve months immediately preceeding the tariff filing and, as forecasted, for the twelve calendar months subsequent to the month preceding the month in which the tariff filing is made.

[19] *Notice* at 382-83. Although factual and legal conclusions in a Notice of Proposed Rulemaking are usually tentative, this particular *Notice* was combined with an order denying some of the relief requested in the petition filed by the public utility commissions.

[20] *Id.* at 386 n. 18.

[21] National Exchange Carrier Association, Inc.'s Cost Accounting and Procedures Manual, DA 88-1507 (released Oct. 3, 1988).

[22] Under the revised pooling mechanism, those exchange carriers that leave the common line pool will file their own common line tariffs. NECA will continue to file a common line tariff for companies remaining in the pool. As part of the 12 revenue requirement for the common line pool, NECA's administrative expenses assigned to Category I.B will be included in the calculation of the nationwide CCL rate that would have applied if all exchange carriers had continued to participate in the NECA CCL pool. Through the process of calculating the long-term support amount, some of NECA's administrative expenses will be spread among the carriers that are required to pay Long Term Support , and will become part of those carriers individual common line revenue requirement.

[23] The apportionment percentages based on the projected revenues for the three categories will be used to allocate NECA's administrative expenses for the duration of the associated NECA tariff.

[24] *See* Appendix A, Sections 69.603(h) and 69.603(i)(1)-(6). We are modifying language proposed by NECA to achieve greater clarity.

[25] 47 C.F.R. § 61.38.

[26] 5 U.S.C. § 601 *et seq.*

[27] NECA is not the type of small, non-dominant institution that would meet the definitional requirements that are contained in Section 601 of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601. Moreover, Section 601(2) specifically excludes rulemaking proceedings of this type. *See id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-526

In the Matter of

Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License	RM-6122

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1988; Released: December 1, 1988

By the Commission:

INTRODUCTION

1. The Commission has before it a petition for rule making filed by Christian Voice of Central Ohio (petitioner).[1] Petitioner requests an amendment to the Commission's rules to provide a procedure whereby FM licensees could upgrade facilities on higher class adjacent or co-channel frequencies even where an upgrade would require modification of the licensee's community of license.[2] If the proposal were adopted, the Commission could amend the FM Table of Allotments and simultaneously modify licenses to specify higher class operation on the same or an adjacent channel, but at a different community, at the request of the licensee. However, the Commission would not entertain competing expressions of interest or competing applications for the amended allotment.

BACKGROUND

2. Petitioner is the licensee of an FM station on channel 224A at Zanesville, Ohio. As a result of the Commission's elimination of its rule limiting operations on twenty FM channels, including channel 224, to class A facilities, [3] petitioner examined whether it could upgrade its facilities on its present channel. Petitioner's engineering study found that class B1 operations were possible on its channel, but that in order to comply with the Commission's minimum distance separation rules, petitioner would need to relocate its antenna. However, petitioner determined that from any new site complying with the Commission's minimum distance separation rules, it could provide city grade coverage to South Zanesville, but not to its community of license, Zanesville.

3. On March 18, 1987, petitioner filed a petition for rule making to change its allotment from channel 224A at Zanesville to channel 224B1 at South Zanesville. Petitioner noted that Zanesville is presently served by two other local aural services, that the reallotment would provide a first local service to South Zanesville, and that the reallotment would therefore serve the Commission's allotment priorities. Petitioner made clear that, if the reallotment would trigger the opening of a filing window for competing applications for the realloted channel, it would not pursue the reallotment. Petitioner stated that it preferred to retain its class A authorization rather than risk losing to a competing applicant for the reallotted channel. On June 16, 1987, the Mass Media Bureau returned the petition, noting that under current policy, if the requested amendment to the tables were made, the Commission would be required to specify a filing window, accept applications filed by any interested parties, and, if mutually exclusive applications were filed, resolve the mutual exclusivity in a comparative hearing. The Bureau relied on the Commission decision in *Riverside and Santa Ana, California*.[4]

4. The instant petition for rule making followed. Petitioner contends the requested procedure could provide significant public interest benefits by allowing the upgrading of service and changes in service that aid the attainment of our present 307(b) priorities. Petitioner argues that such changes in service are seldom proposed due to the risks inherent in a comparative licensing proceeding. Petitioner also contends that we have rejected the rationale for our decision in *Riverside*, and, therefore, we need not entertain competing applications when the city of license of an existing authorization is modified. Specifically, petitioner cites our decision in *Modification of FM Broadcast Licenses to Higher Class Co - Channel or Adjacent Channels*, for the proposition that when an existing authorization makes a channel unavailable, changes to the authorization may be made without entertaining competing applications for facilities on the channel.[5]

DISCUSSION

5. We believe petitioner's contentions have merit. Indeed, we believe petitioner's arguments, although limited in its petition to changes in an FM licensee's city of license if the change permits an upgrade of facilities, are applicable in other contexts. Therefore, we propose to amend Section 1.420 of our rules to provide a procedure whereby a licensee or permittee may petition the Commission for an amendment to the FM and TV Tables, and modification of its license accordingly, without placing its existing authorization at risk, and regardless of whether that change involves a change in transmitter site, a change in class of channel, or both. We request comments on the public interest benefits of the proposed procedure. We also request comment on our initial views that we should only utilize the procedure if the new community would serve our allotment priorities and policies, and only in those instances where the new allotment is mutually exclusive with the existing allotment.[6]

6. Present Commission policy treats any amendment to the Tables of Allotments changing an allotment's city of license as an event triggering an opportunity for interested parties to file applications for the allotment, regardless of whether the frequency is presently occupied.[7] In other contexts, however, the Commission has recognized that when a frequency is occupied, subjecting the licensee or permittee to the filing of competing applications as a result of an amendment to an allotment, even though the amended allotment is technically a "new" allotment, serves no useful purpose.[8] Indeed, the Commission has

recognized that requiring petitioners to run the gauntlet of a comparative hearing effectively squelches proposals which, if adopted, would further the public interest.[9]

7. We believe substantial public interest benefits could flow from adopting a procedure whereby the Commission could amend the Tables of Allotments and simultaneously modify the license of an existing licensee or permittee to specify a new city of license. First, the procedure will allow changes in the Tables of Allotments which better serve the Commission's present allotment priorities, thereby furthering the statutory goal of providing a fair, equitable, and efficient distribution of facilities among the several states and communities.[10] Our existing policy of requiring a licensee or permittee to risk loss of its present authorization to competing applicants forecloses proposals which, based on our allotment priorities, would result in a preferred distribution of facilities. We are of the tentative view that the proposed procedure, if adopted, should be utilized only in those instances where the petitioner is able to demonstrate that the proposed new community of license is preferrable under our allotment priorities and policies to the present community of license.

8. Second, the procedure could provide licensees and permittees with greater discretion in choosing and modifying technical facilities. Specifically, by using the proposed procedure either in conjunction with a transmitter site relocation or in conjunction with the Commission's procedures for modifying licenses to a higher class of channel in the course of rule making proceedings to amend the Tables, licensees and permittees may be able to improve their technical facilities in circumstances where they might not otherwise be able to do so. Commission policy generally favors upgrades in facilities.[11]

9. The proposed procedure is limited in scope to cases in which the proposed allotment is mutually exclusive with the present allotment. This approach, as opposed to an arbitrary distance limitation, properly limits the procedure's use to those cases in which it would provide public interest benefits that cannot otherwise be provided. Generally, a proposed amended allotment is mutually exclusive with an existing allotment if the city reference coordinates for the new allotment are closer to a licensee's or permittee's transmitter site than the minimum distance separations specified in our rules.[12] However, there may be instances in which a licensee or permittee proposes to modify its assignment to a community to which we could allot the same channel with a site restriction[13] in full compliance with the mileage separation requirements to the proponent's existing station.[14] In those cases, we tentatively believe it is appropriate to consider counterproposals for the site restricted allotment, and, if a counterproposal is filed, to prefer the new site restricted allotment to a change in the existing facility, since the site restricted allotment could provide a new service and is not mutually exclusive with the existing allotment.

10. Similarly, we tentatively conclude that the proposed procedure should be inapplicable to nonadjacent channel upgrades. Present procedures allow the Commission to modify a license or permit to a higher class nonadjacent FM channel in the same community if there are no other expressions of interest in use of the higher class channel or if an additional equivalent channel is available for allotment to the community.[15] Because the allotment of a channel nonadjacent to an existing licensee's or permittee's allotment can proceed regardless of whether the licensee proposes a modification of its community of license, we believe that such allotments should be made available for general application. We specifically invite comments on our analysis of these issues.

11. Present rules provide a procedure whereby television licensees and permittees may exchange intraband noncommercial and commercial channels if the Commission finds that the public interest, convenience, and necessity would be advanced.[16] Thus, the procedures we propose could also be used in conjunction with intraband exchanges of such television channels. There appears to be no valid reason for limiting use of the proposed procedure in the context of intraband commercial/noncommercial channel exchanges. On the contrary, there may be instances in which a channel exchange combined with a change in the city of license would allow the parties to the agreement to fulfill our allotment priorities by, for example, providing a first noncommercial or commercial service, where our present allotment scheme would not allow such service. We specifically invite comments on our preliminary view.

12. Because current Commission policy is to refrain from issuing a notice of proposed rule making proposing to change the city of license specified in an allotment unless the holder of an authorization specifically states that it is willing to compete for the amended allotment in comparative hearing with any new applicants for the allotment, virtually no petitions requesting such rule makings are currently on file with the Commission.[17]

CONCLUSION

13. In light of the foregoing, we propose the revision of Section 1.420 of the Rules to provide a procedure whereby licensees and permittees can seek modification of their authorization in the course of rule making proceedings to amend the FM and TV Tables of Allotments where the amendment and modification would change the allotment's city of license. We believe the proposed procedure could provide substantial public interest benefits in our administration of the FM and TV allotment schemes, by providing flexibility to licensees and permittees to propose changes which would serve our allotment priorities. Therefore, we seek comments concerning the proposed rule change.

14. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

I. ***Reason for Action:***

This action creates a procedure whereby an existing licensee or permittee may seek modification of its license in the course of rule making proceedings to amend the FM and TV Tables of Allotments without risking loss of its existing authorization to competing applicants for the changed allotment.

II. ***The Objective*** **:**

Through this proceeding, the Commission proposes to eliminate the requirement that a party wishing to change its city of license risk loss of its license for pursuing a proposal which would serve the public interest.

III. ***Legal Basis:***

Sections 4(i) and 303 of the Communications Act of 1934, as amended.

IV. ***Description, potential impact, and number of small entities affected:***

This proposal would enable existing licensees and permittees to seek changes in their city of license where the change would serve the public interest, without risking loss of their licenses, in circumstances where they presently would be required to place their authorization at risk in order to change their city of license. Therefore, it would allow greater licensee and permittee discretion in choosing facilities. Since no station would be required to make this change, no station would face additional or higher costs than at present.

V. ***Recording, record keeping, and other compliance requirements:***

None.

VI. ***Federal rules which overlap, duplicate or conflict with this rule:***

None.

VII. ***Any significant alternatives minimizing impact on small entities consistent with the stated objective:***

None.

15. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals advanced herein. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981).

PAPERWORK REDUCTION ACT STATEMENT

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirement and will not increase or decrease burden hours imposed on the public.

EX PARTE CONSIDERATIONS

17. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or ortherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

COMMENT PROCEDURE

19. Under procedures set out in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 30, 1988,** and reply comments on or before **January 17, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W.

20. For further information regarding this proceeding, contact Karl Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1, Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. Section 1.420 is proposed to be amended by adding new paragraph (i) to read as follows:

§ 1.420 Additional Procedures in Proceedings for Amendment of the FM, Television or Air Ground Table of Allotments.

* * * * *

(i) In the course of the rule making proceeding to amend § 73.202(b) or § 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license on the same channel, or on an adjacent or co-channel, or on any channel mutually exclusive with the licensee's or permittee's present assignment, where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

FOOTNOTES

[1] Public Notice was given on November 2, 1987, by Report No. 1688. No party filed comments on the proposal.

[2] For example, a licensee might propose the simultaneous modification of its authorization on channel 244A at City X to Channel 244C2 at city Y.

[3] *See FM Allocation Rules*, 2 FCC Rcd 660 (1987).

[4] 65 FCC 2d 920 (1977), *recon. denied*, 68 FCC 2d 557 (1978). In *Riverside*, we held that if an existing allotment is amended to specify a new community of license, the allotment must be made available for general application, even if there is an existing licensee on that allotment. We relied on *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). In reaching our determination, we noted that no party had offered a public interest justification for departing from our general policy of making available new allotments for general application.

[5] *See* 60 RR 2d 114 (1986) (hereinafter cited as " *FM Adjacent and Co - Channel Upgrades)*. In *FM Adjacent and Co - Channel Upgrades*, we determined that *Ashbacker* does not require that we open every changed allotment for general application. We found the public interest benefits accruing from upgraded FM facilities to be substantial, and determined that exposing existing licensees to the risk of competing applications deterred such proposals without providing any countervailing public interest benefit. We also noted that so long as a proposed new use by an existing licensee is mutually exclusive with its existing use, the channel is not available for use in an *Ashbacker* sense.

[6] As discussed *infra*, we do not believe the proposed procedure should be used in conjunction with non-adjacent channel upgrades.

[7] *See Riverside and Santa Ana, CA*, 65 FCC 2d 557 (1978); *Green Cove Springs, FL*, 3 FCC Rcd 2195 (1988).

[8] *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 51 Fed. Reg. 15628 (1986), *recon.denied*, 3 FCC Rcd 2517 (1988); *FM Adjacent and Co-Channel Upgrades*, 60 RR 2d 114 (1986).

[9] *Id.*

[10] *FM Adjacent and Co-Channel Upgrades*, 60 RR 2d 114 (1987).

[11] *Id.*

[12] The proposed procedure may be used in conjunction with both adjacent and co-channel changes for FM stations, and with co-channel, adjacent channel, and UHF taboo channels in the TV service. *See* 47 CFR §§ 73.207, 73.610, 73.698. Because our minimum distance separation requirements vary depending on the class of channels involved, and the nature of the relationship between the channels involved, the precise extent of the mutual exclusivity which triggers eligibility to use the rule will depend on the nature of the proposal.

[13] In making channel allotments, the Commission generally utilizes so-called "city reference" coordinates in determining the proposed allotment's compliance with our mileage separation requirements. *See* 47 CFR §§ 73.208, 73.611. However, the Commission may allot the channel with a "site restriction" if transmitter sites are available which comply with the Commission's mileage separation requirements and would provide city grade coverage to the community of license.

[14] For example, licensee A proposed to change its community from X to Y on its present frequency, Channel 244A. Channel 244A at community Y is short spaced to A's transmitter site on channel 244A at community X. However, Channel 244A can be used at community Y with a site restriction to avoid short spacing to A's station at community X.

[15] *See 47 CFR* § 1.420(g). For example, if an existing licensee proposes to upgrade its facilities for Channel 244A at community X to Channel 255C2 at community X, the upgrade is a non-adjacent upgrade. Generally, a non-adjacent upgrade is any upgrade in facilities where the higher class channel is not on a frequency within three channels on either side of the existing frequency.

[16] An intraband channel exchange is an exchange of a UHF for UHF channel, or a VHF for VHF channel. In contrast, an interband channel exchange is the exchange of a VHF for UHF channel. The Commission's rules do not provide for the exchange of noncommercial VHF channels for commercial UHF channels, and we have declined to consider such a rule. *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 51 Fed. Reg. 15628 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988). Therefore, we will not consider issues relating to interband exchanges of noncommercial for commercial channels in this proceeding.

[17] However, if in response to this notice the Commission receives petitions requesting a change in the city of license for an existing authorization, we will process such petitions and issue Notices of Proposed Rule Making conditioned on the outcome of this general proceeding, but withhold final action in the proceeding until the resolution of this docket.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST INTERSTATE
SERVICES COMPANY,
Complainant,

v. File No. IC-87-02653

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: November 18, 1988; Released: December 1, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on September 15, 1988, by First Interstate Services Company (First Interstate) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reasons set forth below, the joint motion is granted.

2. This proceeding was initiated by an informal complaint filed by First Interstate against AT&T on March 12, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT & T*, DA-88-462 (released April 13, 1988). Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.

3. First Interstate and AT&T represent that their agreement resolves all claims alleged in the complaint in a manner acceptable to both parties. The parties state that grant of their joint motion will terminate the proceeding in a manner satisfactory to both, and conserve the time and resources of the parties and the Commission.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaint filed by First Interstate Services Company and American Telephone and Telegraph Company IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T
COMMUNICATIONS,
Complainant,

v. File No. E-88-14

GTE SOUTHWEST
INCORPORATED,
Defendant.

ORDER

Adopted: November 18, 1988; Released: December 1, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed November 7. 1988 by AT&T Communications (AT&T) and GTE Southwest Incorporated (GTE) requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reason set forth below, the joint motion is granted.

2. This proceeding was initiated by a formal complaint filed by AT&T against GTE on September 30, 1987[1] alleging that GTE's earnings for interstate access services for the period October 1, 1985 through December 31, 1986 exceeded the authorized rate of return established by the Commission in *Authorized Rates of Return for Interstate Services for AT & T and Exchange Telephone Carriers*, CC Docket No. 84-800 Phase I, FCC 85-257 (released September 30, 1985), *modified on recon.*, FCC 86-114 (released March 24, 1986), *futher recon.*, FCC 86-544 (released Jan. 14, 1987). GTE denied such allegations and moved to dismiss the complaint. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties have reached an agreement that resolves all claims alleged in the complaint.

3. AT&T and GTE state that dismissal of the complaint will affect no other party and will serve the public interest by eliminating the need for further litigation of significant issues raised by the complaint. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and that the proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by AT&T Communications and GTE Southwest Incorporated IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] AT&T filed an amendment to the complaint on April 22, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT TELECOMMUNICATIONS CORPORATION — File No. I-T-C-88-209

Application for authority to lease and operate facilities for direct service to the Union of Soviet Socialist Republics and beyond.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 21, 1988; Released: December 1, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on September 20, 1988, by TRT Telecommunications Corporation (TRT), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between the United States and the Union of Soviet Socialist Republics (USSR) and beyond. The application was placed on public notice on September 28, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the USSR by TRT.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-209 IS GRANTED, and TRT is authorized to:

a. lease from WU World Communications Inc. (WU Worldcom) and operate four telegraph-grade (50-baud) half-circuits in a voice-grade shared bearer circuit operted by WU Worldcom with the Ministry of Posts and Telecommunications of the USSR (MINSVIAZ Moscow); and

b. use said facilities to provide TRT's regularly authorized services between the U.S. and the USSR and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRT and its correspondent in the USSR, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FAIRCHILD COMMUNICATIONS SERVICES CO. File No. I-T-C-88-172

Application for authority to resell services of other carriers to provide telex and facsimile services between the contiguous US and Hawaii, on the one hand, and various international points, on the other hand.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 21, 1988; Released: December 1, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on July 29, 1988 by Fairchild Communications Services, Inc. (Fairchild), requests authority, pursuant to Section 214 of the Communications Act of 1934, to resell the international switched message telephone services of American Telephone and Telegraph Company (AT&T), MCI Telecommunications Corporation (MCI) and US Sprint Communications Company (US Sprint) to provide facsimile service between the contiguous United States and Hawaii, on the one hand, and various international points, on the other hand, and to resell the international telex services of RCA Global Communications, Inc. (RCA) for the provision of international telex service between the contiguous United States and Hawaii, on the one hand, and various international points, on the other hand. The application was placed on public notice on August 3, 1988. No comments were received. Supplements to the application were filed on November 9, 14 and 17, 1988.

DISCUSSION

2. The majority of recent international resale applications granted by the Commission have involved entities seeking authority to provide international switched voice services through the resale of the international switched voice services of existing international carriers. The subject application differs from these applications in that the applicant does not seek authority to resell international switched voice services to provide international switched voice service but, rather, to provide international facsimile service, a non-voice service. Fairchild also seeks to resell international telex service for provision of international telex service. Since these services are the same, that part of the application will be treated as we treat applications for resale of switched voice services for provision of switched voice services. Because of the former request, the application raises a number of issues which are not present when considering applications for resale of a service for provision of the same service.

3. Turning first to request to resell international switched voice services for the provision of facsimile service, we note that AT&T's switched voice tariff contains a limitation on the use of its Long Distance Message Telecommunications Service (LDMTS) for non-voice transmission to some points. Section 2.2.2. of AT&T's Tariff F.C.C. No. 1 at 4th revised page 22 (effective April 28, 1987) states:

Non - Voice Transmission-LDMTS may be used for non-voice transmission to all points other than Mexico (except non-voice facsimile transmission may be used to Mexico) and those certain foreign countries or areas as specified in 3.4.4. and 3.4.8. following.

Section 3.4.4. of AT&T's Tariff F.C.C. No. 1 at 31st revised page 77 (effective September 30, 1988) and 28th revised page 78 (effective September 30, 1988) lists the countries and points to which its LDMTS may not be used for non-voice transmission. Section 3.4.8 of that AT&T tariff at 9th revised page 124.1 (effective September 19, 1988) and 5th revised page 124.2 (effective September 19, 1988) lists the countries and points to which AT&T's LDMTS may not be used for non-voice transmission from Hawaii. Fairchild does not request authority to provide facsimile service to any of the countries or points to which these sections of AT&T's tariff indicate that use of LDMTS for non-voice transmission is prohibited.

4. We shall limit our grant of authority for Fairchild to provide international facsimile service by resale of the international switched voice services of AT&T, MCI and US Sprint to the specified points. In recent decisions authorizing entities to provide international switched voice service on a common carrier basis by the resale of switched voice services of existing U.S. carriers, we have granted the applicants authority to provide switched voice service by resale to all of the points currently or hereafter listed in the international switched voice service tariffs of the carrier or carriers whose services are being resold. However, we would note that where the service being provided by a resale carrier is the same as that being resold, there is likely to be little, if any, effect on the foreign correspondent of the U.S. carrier whose service is being resold.

5. For example, a telephone call from the United States to another country provided by a carrier reselling the switched voice service of AT&T, MCI, US Sprint or other U.S. carrier is not likely to produce operational or economic effects on the foreign correspondent that differ from those that would occur if the U.S. customer placed the call directly with the U.S. carrier whose service is being resold. Under such circumstances, there would appear to be little or no need for such a U.S. resale carrier to obtain its own operating agreements with the foreign correspondent of the U.S. carriers whose services are being resold. Because of this factor and the fact that the reselling carrier is bound by the terms and conditions of the tariffs of the carriers whose services are being resold, we retain sufficient control over the resold voice service by means of our control over the authorizations and tariffs of the carriers whose services are being resold.

6. The resale of one international service, such as switched voice service, to provide a different international service, such as facsimile service, as is the case in this application, could well present a different situation. In such a case, additional action or different equipment may be required on the part of the underlying U.S. carrier's foreign correspondent. Consequently, it is possible that U.S. resale carriers which resell one international service of an underlying U.S. carrier to provide a different international service may be required to obtain operating agreements or other instruments of authorization by the foreign correspondent or other authorities in some countries.[1]

7. We would also note that in its *International Competitive Carrier* decision, the Commission found that each foreign country constituted a separate geographical market.[2] The Commission indicated that this finding was based primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country. [3] The Commission further found that nondominant carriers should be required to obtain an initial Section 214 certificate to provide a given service product to a country.[4] We believe that, because of the potential that U.S. resale carriers which provide international services different from the international services being resold may need to obtain operating agreements or other forms of authority from the correspondents or other authorities in the countries to which they seek to provide service, it is appropriate that such resale carriers be granted initial Section 214 certifications to each country (geographical market) for each service product in accordance with the procedure set forth in the Commission's *International Competitive Carrier* decision.[5]

8. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[6] We find that the market will support additional carriers and that the added competition will be in the public interest.[7]

9. In view of the above discussion, we will not limit our grant of authority for Fairchild to provide international telex service by resale of the international telex service of RCA to specific points but rather we will grant the usual blanket authority granted in cases of resale of message telephone service for provision of message telephone service.

10. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international telex and facsimile service by Fairchild.

11. Accordingly, IT IS ORDERED that application File No. I-T-C-88-172 IS GRANTED, and Fairchild is authorized to:

a. provide international telex service by the resale of the international telex service set forth in RCA's Tariff F.C.C. No. 90 between the contiguous U.S. and Hawaii, on the one hand, and those points listed in the tariff on the other hand; and

b. provide international facsimile service by the resale of the International Message Telephone Service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the contiguous U.S. and Hawaii, on the one hand, and those points listed in the appendix hereto, on the other hand.

12. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

13. This order is issued under Section 0.291 of the Commission's rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] For example, in a Memorandum, Opinion and Order, File No. I-T-C-84-081, (released July 3, 1984), the Commission, by delegated authority, granted Instafax International, Inc. (Instafax) authority to provide digital facsimile services to Hong Kong by resale of AT&T's International Message Telecommunications Service. The Order stated that Instafax indicated that it had conducted preliminary discussions with Cable and Wireless (Hong Kong) Ltd., a prospective foreign correspondent in Hong Kong. On July 12, 1984, Instafax filed, pursuant to the provisions of Section 43.51 of the Commission's Rules, 47 C.F.R. 43.51, copies of: a Business Registration Certificate issued by the Government of Hong Kong; a Public Non-Exclusive Telecommunications Service License granted by the office of the Postmaster General of Hong Kong; and an operating agreement between Instafax and Cable and Wireless (Hong Kong) Ltd.

[2] International Carrier Policies, 102 FCC 2d 812 (1985).

[3] *Id.* at p.828.

[4] *Id.* at p.844.

[5] Because applicants are reselling services rather than acquiring specific facilities, it need not file the circuit addition reports required by Section 63.10(b) of the Commission's Rules, 47 C.F.R. 63.10(b) (October 1, 1987).

[6] *See* the cases cited in Teltec Saving Communications Co. Mimeo No. 3548, (released April 4, 1986) at n. 2.

[7] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

APPENDIX

OVERSEAS POINTS TO BE SERVED BY
FAIRCHILD TELECOMMUNICATIONS SERVICES COMPANY

FACSIMILE (TELEFAX) SERVICE

Afghanistan
Andorra
Angola
Anguilla
Antigua
Argentina
Aruba
Ascension Isd
Australia
Austria
Bahamas (Nassau)
Bangladesh, Peoples Rep. of
Barbados
Belgium
Belize
Benin, Peoples' Rep. of
Bermuda
Bolivia
Botswana
Brazil
Brunei
Bulgaria
Burkina Faso
Cameroon, United Rep. of
Cayman Isd
Central African Rep.
Chad Rep.
Chile
China (Hong Kong)
China (Peoples' Rep. of)
China (Taiwan)
Columbia
Comoros Isd
Congo Rep.
Cook Islands (Rarotonga
Costa Rica

Cyprus
Czechoslovakia
Denmark
Djibouti, Rep. of
Dominica
Dominican Rep.
Ecuador
Egypt, Arab Rep. of
El Salvador
Ethiopia
Falkland Isd
Federated States of Micronesia
Finland
France
French Antilles
French Guiana
French Polynesia
Gabon Rep.
Gambia
German Dem. Rep.
Germany, Fed. Rep. of
Ghana
Gibraltar
Greece
Greenland
Grenada
Guam
Guatemala
Guinea-Bissau
Guinea Rep.
Guyana
Haiti
Honduras Rep.
Hungary
Iceland
India
Indonesia
Iraq
Ireland
Israel
Italy
Jamaica
Japan (incl. Okinawa)
Jordan
Kenya
Korea, Rep. of
Lao People's Dem. Rep.
Lebanon
Lesotho
Liberia
Libya
Liechtenstein
Luxembourg
Macao
Malawi
Maldive Isd

Mali Rep.
Malta
Mariana Isd (Saipan)
Marshalls, Rep. of the (Majuro)
Mauritania
Mauritius Isd
Mexico
Micronesia, Fed. States of
Monaco
Mongolian People's Rep.
Montserrat
Morocco
Mozambique
Namibia
Nepal
Netherlands
Netherlands Antilles
New Caledonia
New Zealand
Nicaragua
Niger Rep.
Niue
Norway
Pakistan
Palau, Rep. of
Panama (Incl. Canal Zone)
Papua New Guinea
Paraguay
Persian Gulf:
  Bahrain
  Kuwait
  Oman, Sultanate of
  Qatar
  United Arab Emirates:
    Abu Dhabi
    Ajman
    Dubai
    Fujairah
    Ras Al Khaimah
    Sharjah
    Umm El Qaiwain
Peru
Philippines
Poland
Portugal
Reunion Isd
Roumania
St. Helena
St. Kitts
St. Lucia
St. Pierre and Miquelon
St. Vincent
Samoa (Western)
San Marino
Sao Tome
Saudi Arabia
Senegal Rep.
Seychelles Isd
Sierra Leone
Singapore, Rep. of
Somali Rep.
South Africa, Rep. of
Spain (Incl. Balearic Isd)
Sri Lanka, Dem. Soc. Rep. of
Suriname, Rep. of
Swaziland
Sweden
Switzerland
Tahiti
Tanzania
Thailand
Togolese Rep.
Tonga
Trinidad
Turkey
Turks and Caicos Isd
Tuvalu
Uganda
United Kingdom
Uruguay
U.S.S.R.
Vanuatu, Independent Rep. of
Vatican City State
Virgin Isd (British)
  Tortola
Wake Isd
Wallis and Futuna
Western Samoa
Yemen Arab Rep.
Yemen, People's Dem. Rep. of
Yugoslavia
Zaire, Rep. of
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO
TELEPHONE COMPANY,
Complainant,

v. File No. E-87-42

AT&T OF PUERTO RICO, INC.,
Defendant.

ERRATUM

Released: December 1, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

Appended hereto is the *Order* (DA 88-1434) released by the Commission on September 15, 1988 in the above-captioned proceeding. An *Order*, reported incorrectly as DA 88-1434 at 3 FCC Rcd 5673, has not been adopted, was published inadvertently, and is therefore stricken.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO
TELEPHONE COMPANY,
Complainant,

v. File No. E-87-42

AT&T OF PUERTO RICO, INC.,
Defendant.

ORDER

Adopted: September 15, 1988 Released: September 15, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On February 24, 1987, Puerto Rico Telephone Company (PRTC) filed a formal complaint with the Commission against All America Cables and Radio, Inc. (AAC&R), now AT&T of Puerto Rico, Inc. (AT&T-PR). PRTC alleged that AAC&R's rates for international message telecommunications service between Puerto Rico and foreign points from 1984 to the present were unjust and unreasonable in violation of Section 201(b) of the Communications Act and sought damages for alleged excessive charges paid and revenues lost. AAC&R denied the allegations and sought dismissal of the complaint.

2. On August 17, 1987, the parties advised that they had reached a contingent settlement agreement, which resolves numerous outstanding disputes between the two companies. As part of the settlement agreement, the parties filed a joint motion to dismiss the instant complaint with prejudice. The parties advised that their joint motion should be granted unless PRTC promptly notifies the Commission by September 15, 1988, that it wishes to further pursue its complaint. No notice has been received by the Commission in this time period and it appears that the settlement agreement has become effective.

3. We find that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and concomitant expenditure of time and resources by the Commission and the parties.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Contingent Joint Motion to Dismiss filed by Puerto Rico Telephone Company and AT&T of Puerto Rico, Inc. IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint is DISMISSED WITH PREJUDICE.

6. IT IS FURTHER ORDERED that this order IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BELLSOUTH MOBILITY, INC. File No. 19942-CL-P-139-B-86

For a Construction Permit for
a new DPCRTS Station to
Operate on Frequency Block
B in the Montgomery, Alabama
Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1988; Released: December 2, 1988

By the Chief, Mobile Services Division:

BACKGROUND

1. On June 2, 1986, the application of Montgomery Independent Cellular Telephone Company, Inc. (MICTC) was selected first in the lottery for the wireline Block B construction authorization for the Montgomery, Alabama Metropolitan Statistical Area (MSA). BellSouth Mobility, Inc. (BMI), the second-ranked applicant in the lottery, filed a petition to deny against MICTC which was granted by the Mobile Services Division (MSD) on July 22, 1987.[1] In that order the MSD dismissed MICTC's application because it found that MICTC was ineligible to apply for the Block B frequencies for the Montgomery, Alabama MSA because it did not satisfy the eligibility requirements of Section 22.902(b) of the Rules as interpreted by the Commission in *Advanced Mobile Phone Service, Inc.* (*Los Angeles Decision*). [2] The MSD order was affirmed by the Chief of the Common Carrier Bureau. [3]

2. Upon the dismissal of MICTC's application, Montgomery MSA Limited Partnership (MMLP), a settlement partnership in which BMI is the general partner, was designated as the tentative selectee. MICTC, Mon-Cre Telephone Cooperative, Inc. (Mon-Cre), a subscriber and reseller in Montgomery, and Montgomery Cellular Telephone Company, Inc. (MCTC), the non-wireline licensee in Montgomery, filed petitions to deny the application of MMLP. BMI filed an opposition. No replies were filed. In addition, on February 2, 1988 and October 18, 1988, MICTC filed requests for a stay of the *Reconsideration Order* pending disposition of MICTC's Application for Review thereof. BMI filed an opposition to the request for stay. We will dispose of MICTC's request for stay and the petitions to deny in this order.

ARGUMENTS

3. With respect to its stay request, MICTC argues that: 1) it has a substantial chance of prevailing on the merits of its appeal; 2) it will be irreparably injured in the absence of a stay because if the MSD grants MMLP's application, it may construct a system, which may prejudice MICTC's appeal; 3) a stay would not irreparably harm MMLP because it could resell the services of the non-wireline system pending its appeal; and 4) the public interest would be served because non-wireline and resale service would prevent any delays in service. In its opposition to MICTC's stay request, BMI argues that MICTC does not have a substantial chance of prevailing on the merits of its appeal; MICTC's allegations of irreparable harm if the stay is not granted are unsubstantiated and speculative; MICTC has not demonstrated that MMLP will not be harmed by a stay; and if the request for stay is granted, cellular service will be delayed in the Montgomery MSA.

4. In their joint petition to deny, MICTC and Mon-Cre argue that MMLP's application should be dismissed for the following reasons: 1) the original BMI application failed to disclose the existence of a pre-filing settlement agreement; 2) BMI's application was cut-off pursuant to Section 22.31(d) of the Rules as a result of a major ownership change initiated in a post-lottery settlement agreement for which it argues there is no exemption from the cut-off rules; and 3) MMLP has not demonstrated that it is financially qualified to be a licensee because the balance sheets of BMI, BellSouth Corporation (BellSouth) and the parent of ALLTEL Mobile Communications of Alabama, Inc. (ALLTEL), all of which were submitted by MMLP to support its financial showing, each showed substantial negative net liquid assets.

5. MCTC argues in its petition to deny that BMI's application was defective because: 1) it did not contain complete and properly drawn 1:250,000 scale maps; 2) the application contained an unexplained 39 dBu contour extension and an impermissble CGSA extension; and 3) BMI did not obtain the necessary assurance of site availability for proposed Cell 3. In addition, MCTC states that BMI's application should be dismissed pursuant to its certification which states that if the certification, that the application is complete in every respect, is incorrect, it will be dismissed without further consideration.

6. In its opposition to the petitions, BMI argues that neither MICTC nor Mon-Cre is presently an applicant in the Montgomery MSA nor have they explained how their status as *potential* resellers demonstrates their standing in this proceeding. Further BMI argues that MCTC, the non-wireline carrier in the Montgomery MSA, has not made specific allegations of fact sufficient to show that it has standing as required by Section 309(d)(1) of the Communications Act of 1934, as amended.

7. Next, BMI argues that its original application did in fact disclose the existence of a pre-filing settlement agreement in a transmittal letter attached to and made part of its Montgomery application. BMI also argues that although BMI, ALLTEL and Contel modified their settlement agreement after the lottery, at no time did they have ownership interests in each other's applications and therefore the modification did not effect a major ownership change and that, in any event, such a post-lottery broadening is consistent with the Commission's policies. Next, BMI argues that it has demonstrated its financial qualifications. It notes that because its total net assets, which the Commission may take administrative notice of, are well in excess of the commitment, it is not required to meet the net liquid assets requirements cited by the MICTC/Mon-Cre petition. To MCTC's argument that BMI's 1:250,000 scale map was improperly drawn, BMI explains that although the CGSA was inadvertently dis-

placed on the map it submitted with its application, the map showed the "relevant area" in question pursuant to the Commission's requirements and is not defective. BMI acknowledges that there is a minor *de minimis* extension of its 39 dBu contour, which was not explained in its application, and offers to pull back its contour to resolve the issue. BMI further argues that it had reasonable assurance of the availability of Cell Site No. 3 and submits a letter from the owner of the cell site to demonstrate this fact. Finally, BMI states that its application was complete and thus properly certified and that in any event, Commission precedent would allow minor post-lottery amendments in order to bring it into compliance.

DISCUSSION

8. *MICTC's Request for Stay.* To obtain a stay of the *Reconsideration Order* pending the disposition of its Application for Review, MICTC must show: 1) a likelihood that it will prevail on the merits; 2) that it will suffer irreparable injury unless the stay is granted; 3) that a stay would not harm other interested parties; and 4) that a grant of the stay will be in the public interest.[4]

9. We find that MICTC has failed to make the required demonstration outlined above. First, MICTC's application has already been rejected by the MSD and the Common Carrier Bureau (CCB) and thus, it is not likely that it will prevail on the merits. Second, we reject MICTC's argument that the appeal would be prejudiced because the Commission would deny the appeal, whatever its merits, to avoid having to either force MMLP to dismantle its existing system, sell it at less than fair market value or require it to turn over its customer base. These statements are completely without merit. That steps may have to be taken to reinstate MICTC's application in the event of a reversal by the Commission, does not support the proposition that the Commission would dispose of its appeal without considering fully its merits.[5] Therefore, we find that MICTC will not suffer irreparable injury if the stay is denied. Third, we find that a stay would harm MMLP by further increasing the non-wireline competitive advantage in the Montgomery MSA.[6] Fourth, we find that a stay would harm the public by delaying the start of wireline cellular service in Montgomery, Alabama. Accordingly, MICTC's stay request is denied.

10. *Standing.* Section 309(d)(1) of the Communications Act of 1934, as amended, provides in pertinent part that "any party in interest" may file a petition to deny, and such petition must contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that the grant of the application would be *prima facie* inconsistent with the public interest.[7]

11. First, we find that MICTC does not have standing as an applicant because its application for the Montgomery MSA was dismissed. However, MICTC and Mon-Cre have made specific allegations in their petition to deny, *e.g.*, MMLP's lack of financial qualifications, which, if true, could adversely affect them both as subscribers and as resellers. Therefore, on this basis, we find that they have established standing.

12. We find that MCTC lacks standing. MCTC has stated that it has an "interest in ensuring that the wireline authorization for the market is properly applied for and awarded" and "that the applicants for, and the eventual holder of, the wireline authorization in Montgomery are bound by the same rules and standards as MCTC." MCTC Petition at 2. However, MCTC's petition has failed to specifically allege how the grant of MMLP's application, even assuming a failure to comply with the Commission's application requirements, would adversely affect MCTC as MMLP's competitor. Nevertheless, we will address all the petitioners' claims, including those of MCTC, because of the significant issues they raise.

13. *Disclosure of BMI's Pre-Filing Settlement Agreement.* There is no support for the allegation that BMI failed to make all required disclosures in its application. BMI's Montgomery application disclosed BMI's pre-filing settlement agreement with ALLTEL and Contel. Thus, we find that BMI's application has met the disclosure requirements of Section 22.13(a) of the Rules.

14. *Modification of BMI - ALLTEL - Contel Settlement Agreement.* Section 22.23(g)(4) of the Rules provides that an application will not be considered to be newly-filed if it is amended to reflect "only a change in ownership or control which results from an agreement under Section 22.29 of the Rules,[8] whereby two or more applicants entitled to participate in a random selection process, or comparative consideration of their applications, join in one or more of the existing applications and request dismissal of their application(s) to avoid the random selection process or the delay and cost of comparative consideration." (footnote added). MICTC and Mon-Cre state that BMI and ALLTEL modified their pre-filing settlement agreement after the lottery and that Section 22.23(g)(4) and Section 22.29 of the Rules does not contemplate such a modification. Therefore, they argue, BMI's amendment reflecting the post-lottery settlement agreement, is not exempt from the cut-off rules under Section 22.31(d) of the Rules.[9]

15. We reject these arguments. We have previously indicated that the Section 22.23(g)(4) exemption to the cut-off rules is applicable to a "post-lottery broadening" of a settlement that was formed prior to the lottery.[10] Such a broadening would include, among other things, a post-lottery modification of a pre-filing settlement agreement whereby one or more parties to the original settlement agreement transfer its(their) partnership interest(s) through trade, or sale to another party to the original settlement agreement.[11]

16. *MMLP's Financial Qualifications.* Section 22.917(b)(1)(i) of the Rules requires applicants obtaining financing from entities other than a recognized lending institution to submit proof that the financing entity has the funds available and uncommitted to another cellular application. If the applicant demonstrates that the financing entity owns total assets vastly in excess of the amount committed, the net liquid assets test is inapplicable.[12] BellSouth Corporation's total assets are shown to be over 27 billion as of December 31, 1987; ALLTEL Corporation's total assets are shown to be over1.6 billion as of that same date. For BellSouth, this is an asset-to-commitment ratio of over 12,000 to 1; for ALLTEL, the ratio is over 700 to 1. Therefore, MMLP has demonstrated, under the "total assets" test, which is the applicable test, that it has sufficient assets to fund a maximum 2,182,000 commitment.

17. *BMI's Map of Proposed Cell 3.* MCTC argues that BMI's application was defective because its 1:250,000 scale map failed to depict the entire border of the MSA and because its proposed CGSA and 39 dBu contour for Cell 3 extended beyond the MSA. These arguments are rejected.

18. First, BMI's application was not defective for failure to depict all of the MSA on its 1:250,000 scale map. In *BellSouth Mobility, Inc.*, 2 FCC Rcd. 6997 (1987), we held that the applicant is not required to show the entire MSA, but only the relevant area. BMI's proposed CGSA did not encompass the most easterly portions of the MSA and therefore two maps were not necessary to display the relevant area.

19. Second, we find that BMI's application was not defective even though, as it concedes, its CGSA extended beyond the Montgomery MSA. In *Cellular Communications Systems*, 89 FCC 2d 58, 87 (1982), the Commission held that the CGSA may extend beyond the boundaries of the SMSA but the extension must be *de minimis* and not include an area within another "central" SMSA. It may extend into a "non-SMSA" or "secondary" SMSA. We find that BMI's CGSA extension is *de minimis* [13] and is permissible because it extends into a "non-SMSA", *i.e.*, the Lee Rural Service Area.

20. Finally, it was established in *Cellular Application Filing Procedures and Update*, 52 Rad. Reg. 2d (P&F) 725, 726 (1982) and *Cellular Communications Systems*, 89 FCC 2d 58, 87 (1982) that a "[m]inor overlap of dBu contours (but *not* CGSA) into another *central* SMSA will not render an application defective, provided that the applicant includes a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (NECMA)." *Procedures and Update*, 52 Rad. Reg. 2d (P&F) at 726 (emphasis added). The Commission has also held that the failure to provide the required explanation or justification for a 39 dBu contour extension into another *central* SMSA will render an application defective and subject it to dismissal. *See Return of Round IV Cellular Applications*, 103 FCC 2d 171, 174-77 (1986)(all involving dismissals of applications for 39 dBu contour extensions into other central SMSAs). Further, the Commission has stated that such an explanation is required for an extension into a "secondary" SMSA. *National Cellular Communications, Inc.*, 2 FCC Rcd 1658 (1987). However, the Commission has not heretofore stated that such an explanation is required where the 39 dBu contours extend into a "non-MSA", as they do in this case. Therefore, we find that BMI's application was not defective for failure to provide an explanation of its 39 dBu contours extension beyond the Montgomery MSA. We will, however, require future applicants to provide such explanations. In the present case, we are making the grant of BMI's application contingent upon its submission of either an amendment to eliminate both the CGSA and 39 dBu extensions or an adequate explanation and justification of why we should permit these *de minimis* extensions.

21. *Assurance of Site Availability of Proposed Cell 3.* BMI was required to show in its application that it had a "reasonable assurance" that a proposed site would be available.[14] As noted in the MCTC petition at 9, the Commission has clearly stated that "[*a*] *t the time the application is filed*, the applicant must determine . . . if a new structure is to be built, that the property is available for such use and that it is reasonable to anticipate that it may use this space."[15] As MCTC also notes, in its petition at 9, an applicant is not required to obtain an absolute assurance or enter into a binding agreement regarding the use of a site.[16] BMI's application clearly complied with the Commission's site availability requirements. The record indicates that BMI, through its agent, Chicago Title Insurance Company (CTI)[17] obtained a letter from the owners of the proposed site, John and Lauretta W. Phaturos clearly indicating their willingness to enter into a lease with CTI "or its assigns" for use of the proposed site. The letter describes the tract in detail and accepts in payment for the "letter of intent" a non-refundable sum of 100.00. We find this to be sufficient.

22. MCTC also argues that even if BMI had a reasonable assurance of site availability at the time it filed its application, the loss of reasonable assurance of availability of the site during the pendency of the application would require a report to the Commission pursuant to Section 1.65 of the Rules, citing in support *Dale A. Owens*, 56 FCC 2d 482, 484 (Rev. Bd. 1975). MCTC describes a statement by Mr. Phaturos that the Phaturos' considered any obligation they might have had to be terminated.[18] However, in *Dale A. Owens*, not only did the site owner consider the obligation of site availability terminated, he communicated to the applicant that unless an agreement was executed, the authorization to use the site would be withdrawn.[19] Here, MCTC has not indicated that the Phaturos' beliefs, that reasonable assurance was terminated, were communicated to the applicant.

23. *BMI's Certification.* We further conclude that MCTC's statement that BMI's certification was improper, because of a lack of completeness, is without merit in light of the foregoing discussion.

24. After careful review of the application and associated pleadings, we find BellSouth Mobility, Inc. legally, technically and otherwise qualified to become a Commission licensee.

ORDERING PARAGRAPHS

25. Therefore, for the foregoing reasons, IT IS ORDERED, That the application of BellSouth Mobility, Inc., File No. 19942-CL-P-139-B-86, IS GRANTED. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the FCC and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to any interference protection in any areas outside the Montgomery, Alabama MSA and is further conditioned upon coordinating with current and future licensees in the adjacent markets and upon providing interference-free operations to licensees in those areas.

26. IT IS FURTHER ORDERED, That the petitions to deny filed by Montgomery Independent Cellular Telephone Company, Inc., Mon-Cre Telephone Cooperative, Inc. and Montgomery Cellular Telephone Company, Inc. ARE DENIED.

27. IT IS FURTHER ORDERED, That the grant is conditioned upon the submission by BellSouth Mobility, Inc. of either an amendment eliminating the CGSA and 39 dBu contour extensions discussed herein or in the alternative, an explanation or justification of why we should permit these *de minimis* extensions.

28. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *Montgomery Independent Cellular Telephone Company, Inc.*, 2 FCC Rcd. 4385 (1987) (*MO & O*).

[2] 93 FCC 2d 683 (1983).

[3] *Montgomery Independent Cellular Telephone Company, Inc.*, 3 FCC Rcd. 396 (1988) (*Reconsideration Order*).

[4] *United States Cellular Corporation*, DA 88-1537, released October 13, 1988, citing *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F. 2d 841 (D.C. Cir. 1977).

[5] The cases cited by MICTC, *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585, 589 (D.C. Cir. 1968), *Community B'casting Co. v. FCC*, 274 F.2d 753, 758-59 (D.C. Cir. 1960), *Kodiak Airways, Inc. v. Civil Aeronautics Bd., 447 F.2d 341, 345 (D.C. Cir. 1971) and Cape Fear B'casting Co.*, 23 Rad. Reg. 2d (P&F) 417, 419-20 (1971), relating to the improper grant of interim operating authority to one of two competing applicants for a permanent grant, are clearly distinquishable from this case. Unlike those cases in which neither applicant had been found to be qualified, by this order MMLP has been found to be qualified and MICTC has been found by both the MSD and CCB to be unqualified.

[6] The non-wireline grantee became licensed to operate on July 26, 1988.

[7] *See also* Section 22.30(a)(3) of the Rules.

[8] Section 22.29 of the Rules encourages parties to contested proceedings to settle their disputes among themselves such as exist in this proceeding.

[9] Section 22.31(d) of the Rules provides that an application will be returned with prejudice if not filed by the required date. Major amendments that are not exempt under Section 22.23(g) are considered newly-filed applications and are cut-off if filed after the Commission's prescribed cut-off dates for the filing of applications.

[10] *Guidelines for Settlements and Changes of Ownership of Cellular Systems*, Report No. CL-86-99, released March 24, 1986.

[11] *See Newport News Cellular Telephone Company*, Mimeo No. 6607, released Aug. 27, 1986.

[12] *See American Cellular Corp.*, 103 FCC 2d 26, 30-31(1986)(a demonstration of total assets in excess of 14 times the amount of the commitment is sufficient to dispense with the net liquid assets requirements). *See also Arnold C. Leong*, 1 FCC Rcd. 607 (1986) (involving an assets-to-commitmentratio of 53 to 1).

[13] As MCTC notes, the proposed CGSA and the 39 dBu contour of proposed Cell 3 extend approximately 5.8 square miles outside the boundary of the MSA. We have consistently found extensions greater than this to be *de minimis*.

[14] *Public Mobile Radio Service*, 95 FCC 2d 769, 778 (1983), *recon. denied*, 99 FCC 2d 311 (1984).

[15] *Charles Mitchell Dant*, 2 FCC Rcd 5584 (1987), *aff'd* DA 88-207, released February 29, 1988 (emphasis added).

[16] *GTE Mobilnet of Portland, Inc.*, 53 Rad. Reg. 2d (P&F) 1490, 1495 (1983); *Advanced Mobile Phone Service, Inc. (Pittsburgh)*, 52 Rad. Reg. 2d 1104, 1107 (1982).

[17] MCTC raises an issue as to whether an obligation of the owners of the proposed site to CTI would function as an assurance to BMI of site availability. However, the record indicates that CTI was in fact BMI's agent and it is well-established that an applicant may obtain assurances of site availability through an agent. *See Advanced Mobile Phone Service*, 52 Rad. Reg. 2d (P&F) 1593, 1598 (1983) and *Charles Mitchell Dant*, 2 FCC Rcd at 5584.

[18] MCTC failed to attach the described statement to their petition to deny.

[19] *Dale A. Owens*, 56 FCC 2d at 483.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 2, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR VOICE STORE AND FORWARD SERVICE

On November 18, 1988, Pacific Bell and Nevada Bell (Pacific) filed a comparably efficient interconnection (CEI) plan to provide voice store and forward service on an unseparated basis. According to Pacific, its voice store and forward service will allow customers to easily acquire information and to deposit information with enhanced service providers (ESPs). Pacific proposes to offer ESPs several means to provide their services, such as access to Pacific's voice storage systems, software tools with which to create information services programs, prepackaged software programs that ESPs can customize, and network access service.

Pacific states that voice mail is one example of a voice store and forward service. Pacific notes that its CEI plan for voice mail was approved by the Commission (3 FCC Rcd 1095 (1988)). However, Pacific believes that because voice mail is a relatively narrow application of voice storage and forward service, it is appropriate to file a new CEI plan for its proposed service.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before Pacific can begin implementing the proposed service.

According to Pacific, it will account for the joint and common costs of the videotex gateway service pursuant to its Part 32 cost allocation manual that the Commission has conditionally approved (Nevada Bell's and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (1988)). Pacific also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network informtion. Pacific also intends to notify the Commission if it makes any modifications or additions to the proposed service.

Interested parties should file comments on this plan by **January 5, 1989**, and reply comments by **January 19, 1989**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Pacific's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 2, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON TCA'S REQUEST FOR A DECLARATORY RULING ON BETRS EQUIPMENT

On July 27, 1988, Tallon, Cheeseman & Associates, Inc. (TCA) sent a letter to the Chief, Common Carrier Bureau, requesting that the Commission rule on whether the Basic Exchange Telephone Radio Service (BETRS) radio and antenna equipment, located at the subscriber/end user's premises, is telephone company property. According to TCA, the Commission's *Report and Order* in CC Docket 86-495 (3 FCC Rcd 214 (1988)) did not specifically address the issue of the classification of radio and antenna equipment located at the user's premises, but states that it would be in the interest of both the user and the telephone company if the equipment were classified as regulated telephone company plant. TCA believes that if users must purchase the equipment, the high start-up costs may deter new customers. TCA states that the telephone company is in a better position to purchase the equipment in bulk, as well as maintain it. TCA contends that the telephone company could reuse the equipment whereas the user would have no use for the equipment if it relocated to an urban area.

In a supplemental letter dated November 7, 1988, to the Chief, Common Carrier Bureau, TCA requests that the Commission consider another related issue before it makes a decision on the equipment classification question. Specifically, TCA requests that the Commission consider whether the electrical outlet associated with the BETRS system should be classified as part of regulated plant, so that its costs would be attributed to regulated accounts. According to TCA, installation of the electrical outlet is an integral part of installing the BETRS service, and the outlet serves no other purpose for users.

Interested parties should file comments on these letters by **January 6, 1989**, and reply comments by **January 23, 1989**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of TCA's letters can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-134

In the Matter of

Amendment of Sections 43.42 and
43.43 of the Commission's Rules
and Regulations to Increase the
Revenue Threshold for Filing
Pension and Depreciation Reports

REPORT AND ORDER

Adopted: November 3, 1988; Released: December 2, 1988

By the Commission: Commissioner Dennis concurring in the result.

I. INTRODUCTION AND BACKGROUND

1. In our *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 3878 (1987) (hereinafter, the *Notice),* we initiated an inquiry to determine whether we should amend Sections 43.42 and 43.43 of our Rules and Regulations, 47 C.F.R. §§43.42 and 43.43, to increase the revenue threshold for carriers subject to certain reporting requirements. Section 43.42 requires carriers to submit a report containing information specified in that section within thirty days of the adoption of a plan covering "pensions or annuities, sick benefits, disability benefits, death benefits, termination allowances, life insurance, or any other benefit paid or payable, other than those required by law and other than those (excluding pensions and annuities) contracted for with an unaffiliated insurance company, to active, retired, or former employees or to their representatives or beneficiaries, the cost of which is borne in whole or in part by the [carrier]."[1] Section 43.43 requires carriers to report certain information specified in that section before making any changes in the depreciation rates applicable to their operating plant, and in some cases requires this Commission to prescribe the new rates. Each of these rules now requires that the specified reports be made by "each communication common carrier which had operating revenues in the preceding year in excess of1,000,000."[2] These filing thresholds have not been changed since their adoption in 1953. [3]

2. In the *Notice*, we proposed to amend Sections 43.42(a) and 43.43(a) to limit the filing requirement to carriers which both are "dominant" (*i.e.*, possessing the power to control price) and had operating revenue for the preceding year of100 million or more. We noted that in the years since the filing requirements were first established, the structure of the telecommunications industry has changed significantly, and that we have in consequence made substantial changes in our regulatory policies. We tentatively concluded that the relatively low threshold specified in Sections 43.42 and 43.43 is not consistent with our current regulatory scheme, and that these sections required certain carriers to file unnecessary reports.

3. The basic purpose underlying both the prescription of depreciation rates and the systematic collection of information on benefit plans and changes in depreciation rates is for use in evaluating carriers' earnings levels and in tariff proceedings. As a result of the *Competitive Carrier* proceeding,[4] however, we do not routinely review the operating costs, earnings, and rates of return for carriers which are "nondominant" (*i.e.*, lacking the power to control price).[5] Since there does not appear to be any justification for the routine collection of the information specified in Sections 43.42 and 43.43 from nondominant carriers, we proposed in the *Notice* to eliminate the filing requirements for these carriers.

4. In the *Notice*, we also tentatively concluded that the routine filing by smaller carriers of the information regarding pension and benefit plans and changes in depreciation rates is not necessary for our regulatory responsibilities. To parallel our recent revision of the Uniform System of Accounts (USOA),[6] we proposed to amend Sections 43.42 and 43.43 to relieve nondominant carriers and dominant carriers with annual gross operating revenues of less than100 million from the obligation to file routinely the reports specified. The reports from the smaller carriers have only a limited use in our regulatory oversight of carriers, and as a practical matter our routine prescription of depreciation rates is now limited to carriers with annual operating revenues in excess of100 million.

II. COMMENTS

5. Comments on the proposed rules changes were filed by the Ameritech Operating Companies (Ameritech); Microtel, Inc. and SouthernNet, Inc. (filing jointly) (Microtel & SouthernNet); United States Telephone Association (USTA); Western Union Telegraph Company (Western Union); and Williams Telecommunications Company (Williams). No replies were filed. All of the commenting parties support eliminating the Section 43.42 and 43.43 filing requirements for smaller and nondominant carriers.

6. Western Union supports the adoption of the proposed rule amendments. It emphasizes excluding nondominant carriers, and states that there is no reason for these carriers to file benefit plan and depreciation reports on a routine basis. Microtel and SouthernNet also only comment on the exclusion of nondominant carriers from the filing requirements. They state that such data have historically been collected for use in determining the propriety of a carrier's charges or rate of return. They assert that since this Commission no longer conducts these reviews for nondominant carriers, there is no justification for continuing the filing requirement for them. They state that compliance with these requirements imposes substantial costs on carriers and unnecessary administrative burdens on this Commission. Thus, Microtel and SouthernNet conclude that requiring these reports from nondominant carriers is onerous and serves no useful purpose. Ameritech supports the proposed rule changes, stating that since this Commission no longer conducts routine reviews of rates and overall rates of return of nondominant carriers, there is no compelling justification for the continued requirement for the routine reporting of depreciation rate and pension changes by these carriers.[7]

7. Williams supports the adoption of the proposed amendment to Section 43.42.[8] It takes no position with regard to the proposed change to Section 43.43 except to suggest that the Commission make it clear that the rules relating to depreciation practices are not applicable to nondominant interexchange carriers. Williams states that in the years since Section 43.42 was last revised, enormous changes have taken place in the telecommunications industry, making the application of this section to nondominant carriers an anachronism. When Section 43.42 was last revised, the concept of nondominant carriers, with rates subject to marketplace forces rather than regulatory control, did not exist. Williams asserts that the assumption underlying the pension filing requirements (that a carrier's expenses, including the costs of the employee compensation package, affects a carrier's rates) is not valid with respect to nondominant carriers. Williams also notes that there has been increased federal regulation of employee benefit plans, which makes the requirements of Section 43.42 not only unnecessary but duplicative. It states that 29 U.S.C. §1021 *et seq.* requires carriers to submit to the Secretary of Labor reports containing virtually the same information required by Section 43.42, but in a different format and with a different filing date. Williams claims that the filings currently required by Section 43.42 place an "enormous" burden on its management and are valueless in the context of existing Commission policies. Williams therefore supports the adoption of the proposed change in Section 43.42.

8. USTA supports the amendments that were proposed in the *Notice*. It argues, however, that additional changes are required. First, USTA notes that the proposal in the *Notice* would require carriers with annual revenues of100 million or more in the preceding year to file the subject reports. Section 32.11(a) defines a Class A carrier as having revenues from regulated telecommunications operations of100 million or more. USTA argues, however, that this definition is qualified by Section 32.11(e) which states that the initial classification is determined by its lowest annual operating revenues for the five preceding years, and that changes in classification shall be made when operating revenues show a higher or lower classification for five consecutive years. USTA contends that under our proposal, a carrier might be classified as a Class B carrier under Part 32 but also be required to file reports under Section 43.42 and 43.43 if its annual operating revenues for the last year, but not for the last five years, were100 million or greater. USTA proposes that instead the revenue threshold for filing should be changed to match carefully the definition of Class A carriers set out in Part 32 of the Rules. Second, USTA contends that this Commission must confirm that the reporting requirements are inapplicable to all local exchange carriers who are defined as connecting carriers under Section 2(b)(2) of the Communications Act.[9] Section 2(b)(2) of the Act limits the jurisdiction of this Commission with regard to "any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier." Those carriers are, with some exceptions, subject to Sections 201 through 205 of the Communications Act.[10] USTA argues that this Commission has no jurisdiction to prescribe depreciation rates of 2(b)(2) carriers, because they are within the exclusive jurisdiction of state regulatory commissions. Since the reporting of proposed depreciation rate changes from connecting carriers can, USTA claims, lead to no action by this Commission, there is no justification for requiring reports on depreciation from these carriers. USTA also states that this Commission does not routinely regulate any aspect of the pensions of local exchange carriers, apparently contending that this is also a matter beyond our jurisdiction. In addition, USTA argues that the reason given in the *Notice* for collecting information on benefit plans and depreciation, for use in reviewing tariffs, is insufficient to justify the filing requirements since carriers submitting tariffs must show revenue impact in their supporting material independently of these reports. It states that we should eliminate all routine reports on benefit plans, "except insofar as it serves a specific and clearly articulated Commission purpose that is within its jurisdiction and is not duplicated elsewhere."

III. DISCUSSION

9. Our proposal to raise the filing threshold had the unanimous support of the commenting parties, and we conclude for the reasons set forth in the *Notice* that the amendments to Sections 43.42 and 43.43 should be adopted. We reject, however, USTA's suggestion that the statement of the threshold for filing should be tied to the definition of Class A carriers contained in Section 32.11.

10. The rule changes proposed in the *Notice* would require any dominant carrier "which had operating revenues for the preceding year of 100,000,000 or more" to file the reports specified in the respective sections. Subsection 32.11(a) of our Rules[11] specifies that a Class A carrier is one having "annual revenues from regulated telecommunications operations of 100,000,000 or more" and a Class B carrier is one having annual operating revenues of less than this amount. However, as USTA notes, Subsection (e) of Section 32.11 qualifies this definition, so that a carrier will not change its classification until it revenues fall above or below the threshold for five consecutive years.[12] USTA states that under the proposed rule a Class B carrier could be required to file the reports specified in Sections 43.42 and 43.43. USTA asks that the revenue threshold specified in Sections 43.42 and 43.43 be changed so that only carriers classified as Class A carriers pursuant to Part 32 would be required to file the reports specified in Sections 43.42 and 43.43.

11. We decline to make the change requested by USTA. The purpose of the five-year rule in Section 32.11(e) is to provide for stability in a carrier's accounting status, so that the complex and detailed recordkeeping responsibilities of its entire accounting system do not fluctuate from year to year. The reporting requirements specified in Part 43 are based appropriately on single-year threshold values, because they involve far less effort and planning than that entailed by a change in accounting systems. Also, the filing of the benefit and depreciation reports should not impose a significant burden on the larger carriers since they must maintain records of this information in order to comply with other regulatory and statutory requirements. We do not believe that the reasons underlying our rules for determining accounting classification in Part 32 provide a basis for treating benefit and depreciation reports differently from the other reports required by Part 43.

12. USTA asks us to "confirm" that we do not have jurisdiction to compel connecting carriers to file the reports required by Sections 43.42 and 43.43. We deny USTA's request. In this proceeding, we merely update our existing reporting requirements to conform them to current market realities and accounting practices. We neither sought comment on, nor developed a record regarding, the

extent of our jurisdiction over connecting carriers under the Communications Act. In these circumstances, we decline to resolve this matter on the present record. In any event, these reports historically have not been filed by connecting carriers and this Commission has taken no enforcement action with respect to such nonfilings. We do not anticipate at this time any changes in this approach pending resolution of the issue. We would, of course, entertain a petition by USTA, its members or others, for Rule Making, declaratory ruling or other relief in order to provide an opportunity to develop a fuller record for resolving the issue.[13]

13. Williams asks us to clarify that the "rules relating to depreciation practices" are not applicable to nondominant interexchange carriers. The scope of the clarification Williams requests is not clear, however. The instant proceeding addresses only the requirements of Sections 43.43 and 43.42. The intent of the proposed amendment of Section 43.43 is simply to exclude all nondominant carriers from having to comply with the reporting and prescription requirement specified in Section 43.43. If Williams' concern is about the applicability of any specific provision of our depreciation rules other than Section 43.43, it should have identified and discussed that matter with greater specificity. However, there is no showing of a need to modify any other rules in this proceeding.

14. No parties commented on our proposal in the *Notice* (at note 8) to aggregate the revenues of the AT&T interexchange companies so that all of AT&T's regulated subsidiaries would be subject to the reporting requirements. We conclude that this approach is justified. The AT&T subsidiaries do not file separate annual reports with this Commission. Rather, pursuant to a waiver granted in 1984, AT&T files a consolidated report (Form M) of its interstate activities. In its Annual Report, AT&T states that the waiver was obtained "to permit reporting to reflect operational characteristics of AT&T Communications and to avoid the creation of separate reports for the individual integrated units comprising AT&T Communications . . . ."[14] In view of the integrated nature of AT&T's interstate operations, it would not be in the public interest to exempt a subsidiary from the reporting requirements contained in Sections 43.42 and 43.43 simply because its revenues are less than100 million. We instead will view those companies as subject carriers, and require reports from each, as appropriate.

IV. OTHER MATTERS

15. The rule changes which we hereby adopt have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. The rule changes were submitted to the Office of Management and Budget as prescribed by that Act, and approval has been received from that agency. The OMB control numbers are 3060-0167 for the amendment to Section 43.42 and 3060-0168 for the amendment to Section 43.43.

16. We certify that the Regulatory Flexibility Act[15] is not applicable to the rule changes which were proposed in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this *Report and Order* in the Federal Register. As part of our analysis of the proposal described in this Order, however, this Commission has considered the impact of the proposal on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines.[16] Our amendments to Part 43 would have a beneficial economic impact on many smaller local exchange companies and other carriers since the amendments would eliminate recordkeeping and reporting requirements applicable to such companies under our existing rules.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 201-205, 219(b), 220(b), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 219(b), 220(b), and 403, Part 43 of the Commission's Rules and Regulations IS REVISED as set forth in the Appendix below, effective **January 9, 1989.**

18. IT IS FURTHER ORDERED, that the Request for Waiver and/or Petition for Rule Making filed by Williams Telecommunications Company on April 23, 1987 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 43 of the Commission's Rules and Regulations, 47 C.F.R. Part 43, is amended as follows:

1. The authority citation for Part 43 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 USC 154, unless otherwise noted. Interpret or apply secs. 211, 219, 220, 48 Stat. 1073, 1077, as amended; 47 USC 211, 219, 220.

2. §43.42 Reports on Pensions and Benefits.

Section 43.42 is amended by revising the introductory portion of paragraph (a) to read as follows:

(a) Each communication common carrier with annual operating revenues of100 million or more and which has been found by this Commission to be a dominant carrier with respect to any communications service shall, within thrity (30) days after the adoption of a plan (or within thirty (30) days of first becoming subject to this section, if such carrier has adopted a plan), furnish the Commission with the following information (see, however, §43.01):

* * * * *

3. §43.43 Reports of Proposed Changes in Depreciation Rates.

Section 43.43 is amended by revising paragraph (a) to read as follows:

> (a) Each communication common carrier with annual operating revenues of100 million or more and which has been found by this Commission to be a dominant carrier with respect to any communications service shall, before making any change in the depreciation rates applicable to its operated plant, file with the Commission a report furnishing the data described in the subsequent paragraphs of this section, and also comply with the other requirements thereof.

* * * * *

FOOTNOTES

[1] 47 C.F.R. §43.42(a).

[2] 47 C.F.R. §§43.42(a) and 43.43(a).

[3] *See* Amendment of Common Carrier Reports, 42 FCC 88 (1953).

[4] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, *First Report and Order*, CC Docket No. 79-252, 85 FCC 2d 1 (1980), *Further Report and Order*, 91 FCC 2d 59 (1982), *recon*, 93 FCC 2d 54 (1983), *Third Report and Order*, Mimeo No. 012, (released Oct. 6, 1983), 48 Fed. Reg. 46,791 (Oct. 15, 1983), *Fourth Report and Order*, 95 FCC 2d 554 (1983), *Fifth Report and Order*, 98 FCC 2d 1191 (1984), *recon denied*, FCC 85-572 (released Nov. 20, 1985), *Sixth Report and Order*, 99 FCC 2d 1020 (1985), *rev'd sub nom.* MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[5] *See First Report and Order, supra* note 4.

[6] *See* Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, CC Docket No. 78-196, FCC 86-221 (released May 15, 1986) (*USOA R & O), recon.*, 2 FCC Rcd 1086 (1987). The new USOA, embodied in Part 32 of the Commission's Rules effective January 1, 1988, created two classes of carriers: Class A carriers, who have annual gross operating revenues of100 million or more, and Class B carriers, who have annual gross operating revenues of less than100 million. *See* 47 C.F.R. §32.11(a). We concluded that detailed accounting and reporting requirements are not necessary to provide this Commission with the information we need for the regulation of these smaller, Class B carriers. *See Further Notice of Proposed Rulemaking* in CC Docket 78-196, FCC 84-634 (released January 3, 1985), 50 Fed. Reg. 1590 (1985), at para. 25; and *USOA R&O* at paras. 21 and 109.

[7] Ameritech apparently wishes us to go further than the changes proposed. It states that the reporting requirements should be eliminated when their underlying purpose is no longer justified or useful and that in all cases where reduced regulation is appropriate the carrier's size and market share should not be the "sole benchmark" for determining regulatory relief. Ameritech makes no specific proposals in the context of this Rule Making proceeding, however, and it otherwise supports adoption of the proposed changes.

[8] Before the *Notice* was released, Williams filed a Petition for Rule Making seeking essentially the same rule changes which we proposed therein. In view of our action herein, we dismiss that petition as moot.

[9] 47 U.S.C. §152(b)(2).

[10] 47 U.S.C. §§201-205.

[11] 47 C.F.R. §32.11(a).

[12] Subsection 32.11(e), 47 C.F.R. §32.11(e), states as follows:

> (e) The initial classification of a company shall be determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification shall be made when the annual operating revenues show a greater or lesser classification for five consecutive years. Companies becoming subject to the jurisdiction of the Commission and not having revenue data for the five immediately preceding years shall estimate the amount of their annual revenues and adopt the scheme of accounts appropriate for the amount of such estimated revenues.

[13] We also note that under the rule revisions we adopt today, few connecting carriers will be required, as a practical matter, to file the requisite reports because most such carriers have revenues less than 100 million.

[14] AT&T Annual Report for 1986 at 2.

[15] 5 U.S.C. §601 *et seq.* (1982).

[16] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN
BELL TELEPHONE
COMPANY

Comparably Efficient Interconnection
Plan for the Provision of Voice
Messaging Services

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1988 Released: September 29, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 1, 1988, pursuant to the requirements of the *Computer III* proceeding,[1] Southwestern Bell Telephone Company (SWB) filed a Comparably Efficient Interconnection (CEI) Plan (the Plan) for Voice Messaging Services (VMS). VMS is an enhanced service that allows subscribers to receive and to originate and distribute messages using voice storage equipment collocated with SWB's basic service facilities.[2] Six parties filed comments on the Plan, and SWB filed a reply. [3] As described below, we approve the Plan, but require SWB to file (i) informational amendments clarifying the service areas and network locations where VMS will be offered; (ii) sample tariffs that meet our CEI requirements; (iii) annual affidavits attesting to compliance with nondiscrimination procedures; and (iv) quarterly reports on the installation and maintenance of CEI services.[4]

II. BACKGROUND

2. The *Computer III* decision requires a BOC that wishes to offer an enhanced service, or class of enhanced services, on an unseparated basis prior to implementation of a comprehensive Open Network Architecture (ONA) plan to submit and obtain approval of a CEI plan for the specific services it proposes to offer. Such a plan must meet the CEI requirements established in the *Computer III* proceeding, as well as other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[5] The Commission has stated that consideration of CEI plans that are substantially similar to those previously approved for another carrier will be expedited.[6] SWB states that its Plan is virtually identical to a Pacific Bell CEI plan that has already been approved.[7]

III. SERVICE DESCRIPTION

3. SWB's proposed VMS will allow subscribers in selected wire centers to receive messages and to originate and distribute messages using voice storage equipment collocated with SWB's basic service facilities. As described in the Plan, and more fully detailed in the SWB Reply, the service has two applications.[8]

4. The telephone answering application detects busy/no answer conditions on a subscriber's line and forwards an incoming call to an answering system where the caller can leave a message in the subscriber's "voice mailbox". SWB plans to assign voice mailboxes based on the subscriber's telephone number so that the called number corresponds to the voice mailbox that will receive the message. The VMS system can notify subscribers of a message in a variety of ways, including stutter dial tone or visual "message waiting" indications. Subscribers can retrieve messages using a touchtone phone.

5. The voice mail application allows subscribers to record and distribute voice messages to one or more recipients. With voice mail, the caller dials the VMS system, records the message, specifies the number or numbers to receive the message, and exits the system. The subscriber originates and controls the content of all distribution lists, which will consist of telephone numbers.

6. In both VMS applications, the subscriber needs a touchtone telephone, a voice-grade subscriber line between its premise and the serving central office, and for telephone answering, some form of call forwarding.

IV. COMPLIANCE ISSUES

A. *CEI Requirements*

7. The Commission's CEI requirements are designed to give enhanced service providers (ESPs) equal and efficient access to those basic services that AT&T and the BOCs use to provide their own enhanced services.[9] The Commission did not require absolute technical equality, but rather sought to achieve fairness and efficiency for all competing enhanced service providers. In formulating the CEI parameters,[10] the Commission took care to see that they could be satisfied in a flexible manner, consonant with the particular services at issue. We evaluate the CEI parameters formulated by the Commission pursuant to this standard. We discuss specific parameters below.

1. *Proposed CEI Arrangements*

8. SWB plans to collocate its VMS equipment with, but not physically integrate it into, its central office equipment. SWB will interconnect its VMS equipment to the telephone network using existing Simplified Message Desk Interfaces (SMDI), multiline hunt groups, dedicated private line data channels, or functionally equivalent existing offerings.[11] SWB proposes to offer CEI to itself and to competitors through access lines available under state tariffs. These lines fall into two general categories: lines originating and terminating calls to VMS systems, such as Plexar lines,[12] standard business lines, direct inward dial trunks, Foreign Exchange (FX) lines, and 800 service lines; and (2) data lines that pass signal information about the call to VMS competitors, such as 3002 series analog private lines.[13] SWB states that it will offer, on a first-come, first-served and unbundled basis, additional central office services, such as SMDI and certain types of call

distribution services at the same rate that SWB charges its VMS offering for those services.[14] SWB states that it will also offer competitors certain types of central office hardware-and software-supplied call distribution services, such as multiline hunt groups, automatic call distribution, and uniform call distribution.[15]

2. CEI Parameters

9. The *Phase I Order* lists nine CEI parameters.[16] Commenters raise issues with respect to four of them:[17] installation, maintenance and repair; end user access; CEI availability; and recipients of CEI.[18]

a. Installation, Maintenance, and Repair

10. The time periods for installation, maintenance, and repair of the basic services included in a CEI offering must be the same as those the carriers provides to its own enhanced service operations.[19]

(i) *Positions of the Parties*

11. ANPA states that SWB's plan for installation, maintenance, and repair fails to distinguish simple repair from maintenance that is aimed at prevention or upgrading. It states that the Plan should reflect the factors that will determine priorities for such maintenance and explain the procedure for auditing service order handling to determine whether supervision of personnel is sufficient to ensure nondiscrimination.[20] SWB replies that the highly mechanized, nondiscriminatory procedures outlined in its Plan are more unbiased than those which the Commission required in CC Docket No. 86-79 for BOC provision of customer premises equipment.[21]

(ii) *Discussion*

12. The Commission has not distinguished between maintenance and repair, as ANPA asks us to do, and ANPA has not explained why such a distinction is meaningful. We therefore decline to adopt ANPA's suggestion that the plan differentiate between maintenance and simple repair. With respect to ANPA's other concerns, we recognize that a full evaluation of the BOCs' nondiscrimination procedures is pending in the ONA proceeding.[22] We find that the procedures which SWB describes provide substantial assurance that for the interim period during which its ONA plan is being evaluated, it cannot discriminate in the provision of installation, maintenance, and repair of basic services and facilities. Accordingly, we approve this aspect of the Plan.

b. End User Access

13. If a carrier offers end users the ability to use abbreviated dialing or signalling to activate or access the carrier's enhanced offerings, or to access basic facilities through derived channels, it must provide, as part of its CEI offering, the same capabilities to end users of all enhanced services that utilize the carrier's facilities.[23]

(i) *Positions of the Parties*

14. SWB proposes "one call" service to allow its VMS subscribers to purchase features such as speed dialing at the same time as they arrange for VMS. SWB states that competing VMS providers also could offer customers "one call" ordering service by getting customer authorization to order basic service on their behalf. ANPA states that SWB should clarify the types of written customer authorizations it requires. ANPA also asks how quickly SWB will provide basic services for nonaffiliates' voice messaging customers as compared to SWB's own.[24]

(ii) *Discussion*

15. In the ONA proceeding, the Commission is evaluating SWB's proposal to require competing enhanced service providers to obtain end user authorizations in order to obtain Complementary Network Services (CNSs).[25] In the interim, and without prejudice to any determinations in the ONA proceeding, SWB may require reasonable evidence of customer authorization to enable competing VMS providers to offer "one call" ordering service to their customers.[26]

c. CEI Availability

16. A carrier's CEI offering must be fully operational and available on the date that it offers its corresponding enhanced service to the public. In addition, the carrier must specify a reasonable time prior to this date during which prospective users of CEI, such as enhanced service competitors, can utilize the CEI facilities and services for purposes of testing their enhanced service offerings.[27] A carrier that offers a specific enhanced service under the interim CEI requirements need only offer CEI capabilities in the geographic areas where it is offering that enhanced service. The carrier's CEI plan should contain a description of the areas in which it will offer the unseparated enhanced service, as well as the network locations within those areas through which it will provide CEI.[28]

(i) *Geographic Availability*

(a). *Positions of the Parties*

17. SWB states that upon Plan approval, it will be able to implement initial offerings of VMS at selected end offices using currently available vendor technology. During the latter half of 1988, its initial offerings, within selected wire centers in its five-state territory, will be limited to intraoffice applications only, because certain interoffice network signalling capabilities are not yet available. SWB states that in areas where it uses the CEI services described in the Plan to provide VMS, those services will be available to other ESPs at the same locations and on the same terms and conditions on a first-come, first-served basis. SWB states that after approval of its ONA Plan, it will provide wide-scale deployment of mass-market VMS offerings where sufficient market demand exists. It states that competitive providers then will have access to the same network capabilities on a market-area basis.[29]

18. Some commenters[30] seek clarification of the service areas and network locations where the SWB will offer VMS. ATSI states that SWB can use its control of deployment decisions to disadvantage competitors by, for example, withholding availability of CEI and ONA functions until SWB is able to provide service to the area in question. ATSI claims that the limited availability of CEI may entrench SWB in a dominant market position before ONA is implemented.[31] SWB replies that it has not yet established the exact locations of its VMS offerings and a disclosure of any locations at this time would be misleading. It proposes to provide this information at least 90 days in advance of using its basic CEI services to support

delivery of its VMS offering. It states that this commitment is consistent with the notice requirement for use of a new basic service element (BSE) in the ONA context.[32]

(b). *Discussion*

19. The Commission has stated that a carrier's CEI plan should contain a description of the geographic areas in which it will offer the unseparated enhanced service, as well as the network locations within those areas through which it will provide such service.[33] We believe that to satisfy this requirement, the Plan must be more specific. Because SWB intends to limit CEI availability to those locations where its VMS will be deployed, adequate information about its deployment plans is especially important. Consistent with SWB's proposal in its Reply, we require SWB to amend the Plan at least 90 days prior to offering VMS to clarify the service areas and network locations where it will offer VMS.

(ii) *Switching Capacity*

(a). *Positions of the Parties*

20. The Plan notes generally that there are capacity limitations in available voice messaging systems and states that SWB will provide CEI on a first-come, first-served basis.[34] Two commenters[35] seek clarification of the network services or functions that would be affected by such limitations. Telenet asks that SWB describe the nature of such capacity limitations and the projected time frame within which SWB will expand its network sufficiently to eliminate such limitations. Telenet also seeks specification of the procedures which SWB will use to allocate limited capacity among all VMS providers.[36]

21. SWB replies that by capacity limitations it refers not to CEI service limitations but to the limited capacity of current switch technology to serve multi-wire-center market areas, particularly the availability of Input/Output (I/O) channel capacity required for SMDIs.[37] SWB states that its switches probably have sufficient I/O capacity to meet anticipated demand, but that its policy is not to fully equip this capacity until demand exists. It states that it will offer equipped SMDI interfaces on a first-come, first-served basis.[38] SWB states that it will use no more than 50 percent of spare equipped capacity for its own needs.[39] It states that if the equipped I/O channel capacity is insufficient to meet total SMDI demand, upon receipt of a firm order, it will initiate an "equipment addition."[40]

(b). *Discussion*

22. We find that SWB has adequately addressed the potential limitations on equipped I/O channel capacity. Given the lack of any specific objection to the means which SWB proposes for allocating limited capacity, we find such procedures to be sufficient.

d. *Recipients of CEI*

23. Carriers may not restrict the availability of CEI to any particular class of customer or enhanced service competitor.[41] However, customer or use restrictions for state-tariffed basic services may be permissible, but carriers must provide an explanation of, and justification for, any such state-tariffed restrictions in their CEI plans.[42]

(i) *Positions of the Parties*

24. Some commenters object to the customer and use restrictions that SWB says may be contained in state tariffs for its CEI services. They argue that the proposed restrictions, particularly against resale, are contrary to Commission policy.[43] MCI and ATSI contend that the Plan must contain greater detail and justification for approval of restrictions of this nature.[44] AT&T states that the Plan restricts CEI availability to enhanced service providers, ignoring a Commission finding that the ability of interexchange carriers to obtain unbundled BSEs for their provision of basic interexchange transport services for BSE-associated information is critical to effective implementaton of ONA.[45]

25. SWB explains that none of its state tariffs will restrict VMS providers from obtaining the CEI services described in its Plan. SWB adds that such tariffs, which it apparently plans to file in the near future, will show that "any such restrictions are generally designed only to prevent technical impairment of the public switched network or to prohibit customers from reselling the SWBT-provided basic service as a common carrier offering."[46]

(ii) *Discussion*

26. SWB represents that any use or customer restrictions appearing in its tariffs for CEI services would be designed only to prevent technical impairment of the public switched network or to prohibit customers from reselling basic services as common carriage. This representation would, if true, comply with requirements with respect to recipients of CEI articulated by the Commission in the *Pactel Order*.[47] That Order expressly considered similar types of restrictions in Pactel's state CEI tariffs and concluded that such restrictions did not preclude compliance with our CEI requirements since the restrictions should have no detrimental effect on Pactel's VMS competitors. However, in the case of Pactel's CEI Plan, we examined sample tariffs submitted with that plan, which enabled us to verify Pactel's compliance. As SWB has itself acknowledged in a slightly different context,[48] the Plan is deficient because no sample tariffs are included. SWB has stated that it would file sample tariffs before obtaining final CEI approval.[49] We require it to submit such sample tariffs for each of its CEI services by November 10, 1988. In order to verify SWB's compliance with its representation regarding use and customer restrictions, we will examine the relevant tariff pages when SWB submits them.

27. It is unclear whether AT&T seeks CEI availability in its capacity as an enhanced service provider or as an interexchange carrier. To the extent that AT&T seeks to be treated as an enhanced service provider that wishes to offer VMS-type services, we find that the Plan does not restrict CEI availability. It is clear that under the Plan, AT&T, acting as an enhanced service provider, would be entitled to take CEI services under state tariffs. To the extent that AT&T seeks to be treated as an interexchange carrier, its pleading is not clear what BSEs or CEI services AT&T must purchase to transport "BSE-associated information" through its interstate network and whether the Plan impinges on this type of service provision.[50] The question of whether BOCs should be required to provide their BSEs in interstate access tariffs is now before the Commission in the ONA proceeding. Therefore, our approval of the Plan in this Order is conditioned on SWB conforming, within a reasonable time period, its tariffing

approach and terms of availability for CEI services to whatever standards the Commission ultimately adopts in the ONA order.

B. *CEI Pricing*

28. The *Phase I Order* established CEI pricing standards applicable to the interconnection, concentration and transmission aspects of CEI services. Among other things, these standards require averaging of interconnection and certain concentration costs, and permit, but do not require, charges for cost-based distance-sensitive transmission that are cost-based.[51]

1. *Positions of the Parties*

29. As noted above, SWB has filed no sample tariffs for the CEI services underlying its Plan. Some parties object to the Plan's failure to include sample tariff pages, claiming that this makes it impossible to determine compliance with the CEI pricing guidelines.[52] Parties also object to SWB's proposal to tariff basic services at the state level only,[53] noting that VMS may involve the origination or termination of interstate calls in SWB territory,[54] and that some competing providers will be offering VMS remotely, through interstate networks.[55] They therefore urge us to require SWB to tariff such services at the federal level also. Telenet adds that in view of SWB's stated intention in its ONA plan to move from cost-based pricing to "marketplace" pricing of BSEs, it is critical that this Commission take jurisdiction over interstate services through the tariff process. Telenet states that foreclosure of Commission review, coupled with the intent to move to "strategic" pricing does not bode well for competition.[56]

30. SWB replies that the "ONA-type" tariffs for its Plan are not yet completed, but will be furnished to this Commission and to all commenting parties as soon as they are. SWB states that at that point it will request final approval of its Plan.[57] According to SWB, one way to determine the workability of its ONA-type tariff, which, it acknowledges, has generated considerable controversy, is to permit at least some BOCs to implement pre-ONA CEI plans on the basis of such tariffs.[58] It notes that if customers do not purchase SWB's VMS services because the underlying CEI services are priced too high, then SWB will suffer the consequences. It states that on the other hand, the success of the ONA-type tariff will be demonstrated if customers do purchase its VMS services.[59]

2. *Discussion*

31. The parties that raise objections to this aspect of the Plan focus on its alleged failures to (1) include sample tariffs and (2) offer CEI services through federal tariffs. As discussed above, SWB must file illustrative tariffs for CEI services by November 10, 1988, as required in *Computer III*.[60] The services that SWB proposes for CEI in the Plan are either presently tariffed at the state level or appear to be unbundled features of existing state-tariffed offerings.[61] The Commission has approved a CEI plan for voice messaging service in similar circumstances.[62] The parties have not offered any arguments in this proceeding that distinguish, for purposes of CEI implementation, SWB's Plan from those that the Commission has already approved. Nor do the parties otherwise convince us that it is necessary or appropriate for us to deviate from these precedents and require federal tariffing. Furthermore, as also discussed above,[63] several parties in the ONA proceeding have asked the Commission to address some general jurisdictional and tariffing issues in the ONA proceeding that are similar to some of those raised by the parties in this CEI proceeding. If the Commission eventually adopts tariffing requirements for ONA services that are inconsistent with SWB's plan, we would, of course, expect SWB to amend the plan to conform to those requirements.

C. *Other Nonstructural Safeguards*

1. *Customer Proprietary Network Information*

32. The *Phase II Order* established CPNI requirements for the enhanced service operations of the BOCs that require them to (1) make CPNI available, upon customer request, to unaffiliated enhanced service vendors on the same terms and conditions that are available to their own enhanced services personnel; (2) limit their enhanced services personnel from accessing a customer's CPNI, if the customer so requests; and (3) notify multiline business customers annually of their CPNI rights. The Commission also required the BOCs, but not AT&T, to provide to unaffiliated enhanced service vendors on the same terms and conditions, any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced services personnel.[64]

a. *Notice*

33. ANPA states that SWB should supplement the Plan to indicate when CPNI notice to customers will take place.[65] SWB states that it will notify customers of their CEI options within a "reasonable" time before it offers enhanced services to customers, and that 90 days would seem reasonable.[66] We find that this 90-day notice period is sufficient.

b. *Access to Restricted CPNI*

34. SWB states that when a customer requests that its CPNI be restricted, it will program a special field within its database designating the account as restricted. An employee lacking an appropriate security level would be denied access. [67] ANPA seeks clarification of whether use of employee "security levels" to restrict access to account information would operate as a password. It also seeks an explanation of procedures to detect and correct unauthorized access.[68] SWB replies that an employee's password, unless the employee were a network-only sales representative, would not permit it to access information in a restricted account.[69] The Plan also states that SWB will advise its sales representatives that a violation of its CPNI procedures will result in disciplinary action up to and including dismissal. We find that SWB has adequately clarified and explained its treatment of restricted CPNI.

c. *Content of CPNI*

35. SWB proposes to follow the CPNI procedures described in its ONA Plan and Amendment thereto.[70] It proposes to define CPNI as including customer service record and customer bill information. Customer service record information includes customer name and service address; billing name, address, and telephone number(s); number and type of access lines; technical characteristics of service (speed of lines, touch tone, etc); and class of service. Customer bill information includes billing name, address and telephone number(s); current charges; long distance billing record; local measured service; directory assistance charges; originating/terminating access usage/charges; and bill summary.[71]

(i) *Credit Information*

36. ATSI contends that SWB proposes to include customer credit history as part of CPNI, to SWB's competitive advantage and to the detriment of customers's privacy rights.[72] SWB replies that it does not include bill payment records as part of CPNI and that therefore enhanced services sales personnel will not have access to this information.[73] We therefore do not need to reach the issue of whether credit history information could properly be treated as part of CPNI.

(ii) *Call Forwarding*

37. ATSI also argues that SWB will be able to identify customers of competing VMS vendors and those vendors, by treating as CPNI information about the use of network services, such as call forwarding, that are necessary for VMS services. It states that SWB thus can tailor its marketing to customers that are demonstrably receptive to VMS and can "lure" such customers away from other vendors.[74] SWB states that subscribing to call forwarding does not necessarily imply that the customer subscribes to VMS. It states that the CPNI of basic service customers does not contain the identity of VMS providers and that the CPNI of VMS providers does not contain the identity of their customers.[75] SWB states that it has "formally committed" not to identify particular customers of existing VMS competitors for "targeted" marketing efforts.[76] Based on SWB's representations, and for purposes of interim CEI implementation, we find that SWB has adequately responded to ATSI's concerns.

(iii) *Modification of Final Judgment (MFJ)*

38. ANPA states that SWB should establish procedures in compliance with the recent MFJ court restrictions on BOC-generated "user profiles".[77] Telenet states that in light of the *March 7 Order*, SWB must make its provision of CPNI to competitors and its own operations "symmterical".[78] We note that the CPNI requirements pertain only to information about basic network services, and we express no opinion on the applicability of the MFJ court restrictions on "user profiles" to SWB's CPNI procedures.[79]

d. *Aggregate CPNI*

39. ANPA states that SWB should specify procedures for ensuring that aggregate CPNI is provided to competing ESPs on a timely basis and on the same terms and conditions.[80] SWB replies that it will establish a central control point for disseminating aggregate CPNI to both its own nonaffiliated enhanced service operations and nonaffiliated competitors. There, an itemized listing of reports or other data authorized for release will be maintained. SWB will honor requests for aggregate CPNI strictly in accordance with this authorized listing. Internal and external entities will be charged the same rates for aggregate CPNI.[81] We find that SWB's treatment of aggregate CPNI is adequate.

e. *Other CPNI Issues*

40. ATSI notes its continuing disagreement with Commission policy "granting . . . preferential access" to CPNI.[82] SWB states that a challenge to Commission policy on CPNI, established in previous proceedings, is procedurally improper.[83] The Commission adopted and affirmed on reconsideration[84] its CPNI rules in the *Computer III* Rule Making proceeding, explicitly declining to adopt the modifications that Telenet and ATSI now advocate. As SWB argues, the review of a CEI implementation plan is not the proper proceeding for revisiting that determination.

2. *Nondiscrimination Reporting*

41. The *Phase II Order* required AT&T and the BOCs to file quarterly nondiscrimination reports that provide comparative data on the timing of installation and maintenance, as well as the quality and reliability, of the basic services offered as part of any CEI tariff.[85] The *Phase II Recon Order* eliminated the quality reporting requirement for AT&T, provided that it (i) amends its ONA plan to include a detailed description of its installation procedures that demonstrates its inability to engage in quality-based discrimination, and (ii) submits an annual affidavit attesting that it has followed the installation procedures described in its ONA plan amendments and has not in fact discriminated with respect to the quality of network services offered. The Commission held that if the BOCs could make a similar demonstration, they too, would be relieved of the quality reporting requirement, subject to the same conditions applicable to AT&T.[86] The *Phase II Recon Order* also modified the installation and maintenance reporting format for AT&T so that it could compare installation and maintenance intervals provided to its own enhanced service operations with those provided to a sampling of all customers. The Commission permitted the BOCs to amend their ONA plans to demonstrate that they lack the ability to discriminate in providing such services. If the BOCs could so demonstrate, the Commission stated that it would modify the installation and maintenance reporting format for them as well.[87]

a. *Position of the Parties*

42. As authorized in the *Phase II Recon Order*, [88] the Plan seeks relief from the *Computer III* reporting requirements on the quality of basic services. It also seeks relief from reporting on the timing of installation and maintenance. Relying on the proposal made in SWB's ONA plan,[89] SWB seeks to file an annual affidavit instead of quarterly quality reports, and also proposes to eliminate the quarterly installation and maintenance reports. In the alternative, SWB submits a proposed reporting format for installation intervals, but would submit affidavits in lieu of maintenance and quality reports.[90] SWB also requests us to eliminate the maintenance reporting requirement, because, it argues, the Commission relieved it of maintenance reporting for CPE, provided that it files an affidavit attesting to compliance with its nondiscrimination procedures and to nondiscrimination in fact.[91]

43. ANPA states that in light of the lesser degree of competition which the BOCs face, as compared to AT&T, relief from reporting requirements, such as was granted AT&T, is inappropriate in this case.[92] According to ANPA, the Plan should also elaborate on the procedures to be used and information to be included in reports so that these reports are detailed enough to permit an assessment of compliance with nondiscrimination requirements.

b. *Discussion*

44. A full evaluation of the BOCs' nondiscrimination procedures is pending in the ONA proceeding.[93] As an interim measure, we find that the procedures described in the Plan provide substantial assurance that SWB cannot

discriminate in the quality of its CEI services, particularly since many of these offerings consist of widely available business services already provided under well-established conditions. Accordingly, on an interim basis we do not require SWB to file quality reports for the CEI services described in the Plan, pending Commission action on the nondiscrimination portions of its ONA amendments. Consistent with its proposal, SWB must file an annual affidavit attesting that it has followed the quality nondiscrimination procedures described in its plan. SWB must file the first affidavit by December 30, 1988. SWB must also file quarterly installation reports for CEI service in the same format required in CC Docket No. 86-79. Since the Commission has not yet completed its evaluation of the BOCs' proposed nondiscrimination arrangements, we also require SWB to file quarterly maintenance reports until a decision on this issue in the ONA proceeding. Because SWB did not file a proposed maintenance reporting format, we require it to file reports using a format previously approved for other CEI plans.[94] In addition, SWB must notify us in writing of any changes to its nondiscrimination procedures prior to the implementation of such changes.

3. Network *Information Disclosure*

45. The Plan states that SWB's provision of VMS will create no changes to existing interconnection specifications, and thus, no current disclosure is required. It states that if network information disclosure obligations arise as a result of modifications, it will describe how it will meet disclosure requirements when it notifies the Commission of pending CEI modifications.[95] ANPA contends that both notification to the Commission and disclosures should comply with "the rule of six-months advance notice.[96] We agree with ANPA that SWB remains subject to all of the Commission network disclosure requirements,[97] although we do not interpret the Plan as proposing anything different. Accordingly, we approve this part of the Plan subject to this interpretation.

D. *General*

1. *Modified Final Judgment*

46. AT&T states that if SWB's contemplated "wide scale deployment" of VMS were to include an interLATA offering, it would raise questions under the MFJ. [98] As we have previously observed, the restrictions imposed by the MFJ court are independent of those which this Commission has imposed on the BOCs.

2. *CEI Review Process*

a. *Positions of the Parties*

47. Some commenters argue that the CEI review process must not establish a precedent, nor become a substitute, for ONA plan review.[99] MCI states that because the MFJ court has approved the BOCs' offering of only a limited number of enhanced services, if the Commission approves CEI plans that encompass the entire subset of permissible BOC enhanced services, then the BOCs will have no incentive to develop ONA fully.[100] MCI states that given the time needed to develop ONA policies and the criticism generated by the proposed ONA plans, CEI plans will not be short-term "interim" measures.[101] MCI adds that SWB's repeated reliance on, and incorporation of, portions of its ONA plan belie a characterization of its CEI plan as temporary.[102] MCI states that the CEI filings to date consist largely of offerings which ESPs currently use in providing their own services, so that the CEI plans will not bring the public any new or innovative services.[103] On the other hand, Octel states that approval of the Plan will extend the opportunity to use enhanced services to smaller business and consumers. Octel states that within its operating territory, SWB is most capable of making these services known, affordable, and widely available.[104]

48. SWB replies that one of the benefits of approving pre-ONA plans is the opportunity to gain experience with principles that may be of long-term utility.[105] Therefore, it argues, it would make sense to permit use of an "ONA-type" tariff in a CEI plan to determine if that type of tariff is workable.[106] SWB states that its offering of VMS, while not a "new" service, represents the entrance of a new competitor into the enhanced services market, in furtherance of *Computer III* policies.[107]

b. *Discussion*

49. Parties' concerns that our CEI plan orders will prejudge the results in ONA are misplaced. As we have previously stated,[108] CEI plan review does not determine the outcome of the ONA proceeding. The Commission has previously determined that there are "substantial benefits to the public" in providing incentives for carriers to develop and implement both CEI and ONA as early as possible.[109] Indeed, the Commission recognized that the review, approval, and implementation of ONA could be a relatively long-term process and explicitly provided for the filing of CEI plans so that the BOCs could offer specific enhanced services to the public, subject to safeguards, to prevent anticompetitive conduct by the BOCs while the ONA process ran its course. Thus, processing BOC CEI plans is fully consistent with the procedures the Commission established for implementing its *Computer III* policies.

V. ORDERING CLAUSES

50. IT IS HEREBY ORDERED that, pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, and 218, and 5 U.S.C. § 553, and Sections 0.91 (h) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h), 0.291, the Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Services of Southwestern Bell Telephone Company IS APPROVED, subject to the conditions described herein.

51. IT IS FURTHER ORDERED that the motion of Southwestern Bell Telephone Company for interim unseparated marketing IS GRANTED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

PARTY FILING CEI PLAN:

Southwestern Bell Telephone Company (SWB)

PARTIES FILING COMMENTS

American Newspaper Publishers Association (ANPA)

American Telephone & Telegraph Company (AT&T)

Association of Telemessaging Services International, Inc. (ATSI)

Octel Communications Corporation (Octel)

Telenet Communications Corporation (Telenet)

MCI Telecommunications Corporation (MCI)

PARTY FILING REPLY COMMENTS:

SWB

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986)(*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987)(*Phase I Recon Order*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon Order*), *further reconsideration pending, appeals pending sub nom. California* v. *FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co.* v. *FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also* Report and Order, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988)(*Phase II Recon Order*), *further reconsideration pending, appeals pending sub nom. BellSouth Corp.* v. *FCC*, No. 87-7290 (9th Cir.) (pet. for rev. filed April 20, 1988), *California* v. *FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co.* v. *FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

[2] Plan at 4-5.

[3] A list of commenters appears in Appendix A. We use the abbreviations in that appendix throughout this order.

[4] Unless we take action to the contrary within 14 days after the latest date on which SWB submits the informational amendments and sample tariffs required in paras. 19, 26, and 31 *infra*, its CEI Plan shall be deemed approved.

SWB has also filed a motion in a separate proceeding supporting Bell Atlantic's request to begin interim, unseparated marketing of an enhanced service prior to CEI plan approval, and urging that the Bureau issue a blanket approval for similarly situated Bell Operating Companies (BOCs). Comments and Motion of Southwestern Bell Telephone Company, *in* Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services and Motion To Permit Interim Unseparated Marketing, dated May 6, 1988. We permit SWB to begin marketing VMS upon compliance with the requirements of this Order specified in paras. 19, 26, and 31.

If SWB desires to offer VMS or CEI for VMS under any conditions other than those approved in this order, it must either amend its Plan or file a new one.

[5] *Phase I Order*, 104 FCC 2d at 1020. A BOC also must satisfy the cost allocation requirements of our *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Recon Order*), *petitions for further recon pending.*

[6] *Phase I Recon Order*, 2 FCC Rcd at 3045.

[7] Plan at ii, 2, *citing* Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Services, Memorandum Opinion and Order, 3 FCC Rcd 1095 (*Paciel Order*), *further order*, 3 FCC Rcd 3552 (1988) (*May 23 Order*) ATSI disputes SWB's assertion. ATSI Comments at 3 n.3.

[8] Plan at 4-6; SWB Reply Comments at 1-2, 16-17. In response to the claims of some commenters, *see, e. g.*, ANPA Comments at 2, the SWB Reply elaborates on portions of the Plan's service description, particularly, the nature and assignment of voice mail addresses. *See* SWB Reply at 16-17; Plan at 5.

[9] *Phase I Recon Order*, 2 RCC Rcd at 3048.

[10] *Phase I Order*, 104 FCC 2d at 1039-1043.

[11] SWB Plan at 6.

[12] Plexar lines are Centrex-type lines.

[13] SWB Plan at 7 & nn. 8 & 9.

[14] *Id.* at 7.

[15] *Id.* at 7.

[16] *Phase I Order*, 104 FCC 2d at 1039-1043.

[17] ANPA also seeks clarification of SWB's statement that SWB will comply with the Commission's transport cost minimization requirement by charging itself the same rate as it charges others for access, "provided that the access connections in each case are equivalent in technical quality." ANPA Comments at 15, *citing* Plan at 14-15. We believe that this statement, which is taken nearly verbatim from the *Phase II Recon Order*, 3 FCC Rcd at 1155, clearly means that the "parity pricing" approach proposed by SWB will apply to access connections of equal quality (*i. e.*, SWB cannot charge itself an equal price for a superior connection) and requires no additional explanation.

[18] We find the Plan adequately satisfies the other five CEI parameters: interface functionality; unbundling of basic services; resale; technical characteristics and minimization of transport costs.

[19] *Phase I Order*, 104 FCC 2d at 1041.

[20] ANPA Comments at 3-4.

[21] SWB Reply at 17, *citing* Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987), *modified on reconsideration*, 3 FCC Rcd 22 (1987) (*BOC CPE Recon Order*). *See also* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 3 FCC Rcd 412, (1988), *further order*, DA 88-705, released May 11, 1988.

[22] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I.

[23] *Phase I Order*, 104 FCC 2d at 1041.

[24] ANPA Comments at 4.

[25] Under SWB's ONA Plan, speed calling is a CNS. Southwestern Bell Telephone Company's Open Network Architecture Plan, CC Docket No. 88-2, Phase I, dated Jan. 25, 1988 (SWB ONA Plan), at 69.

[26] In response to ANPA's concerns about how quickly SWB will install CEI services, we note that SWB is required to install basic services, including call forwarding, on an equal basis for its enhanced service operations and those of its competitors.

[27] *Phase I Order*, 104 FCC 2d at 1041.

[29] *Phase I Recon Order*, 2 FCC Rcd at 3046-47.

[29] SWB Plan at 3-4. SWB states that although its CEI services are not available throughout its service area, it meets the Commission's CEI geographic availability requirement because its VMS offering will not use basic switch functions in places where other providers cannot order the same CEI functions. *Id.* at 13.

[30] ATSI Comments at 6-7; MCI Comments at 3.

[31] ATSI Comments at 6-7 & n. 17.

[32] SWB Reply at 15-16, *citing Phase I Order*, 104 FCC 2d at 1068.

[33] *Phase I Recon Order*, 2 FCC Rcd at 3047.

[34] SWB Plan at 3-4, 7.

[35] ANPA Comments at 2-3; Telenet Comments at 7-8.

[36] Telenet Comments at 7-8.

[37] SMDI capability includes forwarding of the called party Automatic Number Identification (ANI) and the stutter dial tone/message waiting indication. SWB Reply at 8.

[38] *Id.* at 7-9.

[39] *Id.* at 8-9.

[40] *Id.* at 9.

[41] *Phase I Order*, 104 FCC 2d at 1042.

[42] *Phase I Recon Order*, 2 FCC Rcd at 3051, *aff'd*, *Phase I Further Recon Order*, 3 FCC Rcd 1143-45.

[43] *See, e.g.*, MCI Comments at 8.

[44] Id. at 7-8; ATSI Comments at 6.

[45] AT&T Comments at 2-3.

[46] SWB Plan at 16. SWB also states that "if its approach for tariffing the basic services underlying VMS is accepted by the federal and state regulatory commissions, no use restrictions would be required." *Ex parte* Letter from Michael J. Zpevak, SWB attorney, to H. Walker Feaster, Acting Secretary, FCC, dated July 21, 1988 (SWB Ex Parte Letter).

[47] Pactel Order, *supra* note 7, 3 FCC Rcd at 1099.

[48] SWB Reply at 3-6.

[49] Id. at 6.

[50] AT&T Comments at 2-3.

[51] Phase I Order, 104 FCC 2d at 1048-52.

[52] MCI Comments at 8; ATSI Comments at 5; Telenet Comments at 2; ANPA Comments at 5.

[53] Telenet Comments at 4-7; MCI Comments at 8-9; AT&T Comments at 4; ATSI Comments at 5-6.

[54] AT&T Comments at 4; Telenet Comments at 4; MCI Comments at 8-9.

[55] Telenet Comments at 4; MCI Comments at 9.

[56] Telenet Comments at 5-7. Telenet states that prospective competitors may be deterred from competition with the BOCs by the fear of price increases from their sole supplier. *Id.* at 6 n.5.

[57] SWB Reply at 2-6.

[58] Id. at 4-5.

[59] Id. at 5.

[60] *Phase I Order*, 104 FCC 2d at 1055, para. 190; *Phase I Recon Order*, 2 FCC Rcd at 3067 n. 218.

[61] The SMDI, multiline hunting and call distribution services that SWB proposes to unbundle are existing services, currently available in all of its state jurisdictions, with the exception of Automatic Call Distribution, which is available in three of SWB's five states. Letter from Martin E. Grambow, SWB to H. Walker Feaster, Acting Secretary, FCC, dated September 16, 1988.

[62] *Pactel Order*, supra note 7. The Commission also has encouraged the use of existing offerings, including state-tariffed offerings, as components of CEI/ONA. *Phase I Recon Order*, 2 FCC Rcd at 3068 n.261; *Phase I Further Recon Order*, 3 FCC Rcd at 1141 & 1148 n.93.

[63] See para. 27, *supra*.

[64] Phase II Order, 2 FCC Rcd at 3093-98. The Phase II Recon Order declined to require that the BOCs' enhanced service personnel be denied access to CPNI absent prior authorization from customers, and added some specific requirements for implementing the CPNI rules. 3 FCC Rcd at 1161-63, paras. 96- 99, 100-08.

[65] ANPA Comments at 6.

[66] SWB Reply at 13.

[67] SWB Plan, Attachment 2, at 8-9.

[68] ANPA Comments at 6.

[69] SWB Reply at 13-14.

[70] SWB ONA Plan, *supra* note 25; SWB ONA Plan Amendment, dated March 10, 1988 (SWB ONA Plan Amendment).

[71] SWB Plan, Attachment 3; SWB ONA Plan Amendments at 17.

[72] ATSI Comments at 3-4.

[73] SWB Reply at 14. Concerning ATSI's privacy argument, SWB states that customers generally will not consider a BOC's basic service operations and enhanced service operations to be two different entities, whereas a customer would consider the telephone company and an unaffiliated ESP to be two different entities for privacy purposes. SWB Reply at 12-13.

[74] ATSI Comments at 4.

[75] SWB Reply at 11.

[76] SWB *Ex Parte* Letter, *supra* note 48.

[77] ANPA Comments at 6, *iting United States v. Western Electric Co.*, Civ. Act. No. 82-0192, n.40 (D.D.C. Mar. 7, 1988) (slip op.) *(March 7 Order), further opinion, Memorandum Opinion and Order* (D.D.C. June 22, 1988)(slip op.). The "MFJ Court" is the U.S. District Court for the District of Columbia that supervises the AT&T consent decree of 1982 known as the Modified Final Judgement or MFJ.

[78] Telenet Comments at 3 n.2. Telenet contends that BOC use of CPNI is asymmetrical because CPNI is available to a BOC's enhanced service personnel absent an affirmative customer request that it be held confidential whereas BOC competitors must receive customer authorization in order to access the customer's CPNI.

[79] As we have previously stated, our CEI requirements are independent of restrictions imposed by the MFJ. *Pactel Order, supra* note 7, 3 FCC Rcd at 1103, para. 75.

[80] ANPA Comments at 6.

[81] SWB Reply at 14. SWB states that generally a document known internally to it as an End Office Profile should provide ESPs the aggregate data they require "without compromising the proprietary nature of customer information." SWB Plan, Attachment 2, at 13. It states that it will maintain a log of aggregate data reports requested by ESPs, which will include, *inter alia*, the date of report is requested, and the date is provided. *Id.* at 15.

[82] ATSI Comments at 2.

[83] SWB Reply at 10.

[84] *See, e.g., Phase II Recon Order*, 3 FCC Rcd at 1161-1163. *See also* Furnishing of Customer Premises Equipment by the Bell Operating Telephone companies and the Independent Telephone Companies, 2 FCC Rcd 143, 151-53 (1987); *BOC CPE Recon Order, supra* note 21, 3 FCC Rcd at 24-25.

[85] *Phase II Order*, 2 FCC Rcd at 3082.

[86] *Phase II Recon Order*, 3 FCC Rcd at 1158-60.

[87] *Id.* at 1160-61.

[88] *Id.* at 1160.

[89] Plan at 22, *citing* SWB ONA Plan Amendment, annexed as Attachment 1.

[90] SWB describes its proposed reporting for installation on performance in its Plan. Id. at 22, *citing* SWB ONA Plan Amendment, annexed as Attachment 4.

[91] *Id.* at Attachment 4 (excerpt from ONA Plan) & Attachment 1 (ONA Plan Amendment) at 3.

[92] ANPA Comments at 7.

[93] We make no findings in this order prejudging that evaluation.

[94] *Pactel Order, supra* note 7; Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Enhanced Service Providers, *Memorandum Opinion and Order*, 3 FCC Rcd 1108 (1988); Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Enhanced Service Providers, *Memorandum Opinion and Order*, 3 FCC Rcd 3552 (1988).

[95] Plan at 22-23.

[96] ANPA Comments at 7.

[97] *See generally Phase II Recon Order*, 3 FCC Rcd at 1164-65 (summary of network disclosure rules).

[98] AT&T Comments at 1 n.*.

[99] Telenet Comments at 2-3; MCI Comments at 2, 5.

[100] MCI Comments at 1-2.

[101] *Id.* at 5-6. MCI states that the expedited treatment that SWB seeks is not justified because SWB is not yet prepared for full-scale implementationof its VMS offering. *Id.* at 3.

[102] *Id.* at 4-5.

[103] *Id.* at 7.

[104] Octel Comments at 1-2.

[105] SWB Reply at 4.

[106] *Id.* at 4.

[107] *Id.* at 15.

[108] *See, e.g.*, May 23 Order *supra* note 7, 3 FCC Rcd at 3553 and n. 17; supra para. 31.

[109] *Phase I Order*, 104 FCC 2d at 1027.

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